Supreme Court, U.S.
FILED

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No. [redacted]

Supreme Court of the United States
October Term, 2002

NEMESIS VERITAS, L.P. f/k/a MCMAHAN & COMPANY
and D. BRUCE MCMAHAN,

Petitioners,

-against-

WILLIAM A. TOTO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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121 pp

QUESTIONS PRESENTED FOR REVIEW

In this diversity action, the Eleventh Circuit Court of Appeals initially applied the two step choice of law inquiry mandated by, *inter alia, Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and *Day & Zimmerman, Inc. v. Challoner,* 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975), and determined that the state substantive law governing the underlying transaction and not the law of the forum state (Florida) governed respondent's claim for attorney's fees. Subsequently, a Florida intermediate appellate state court held that Florida's attorney fee statute controlled in any action filed in Florida's courts, including an action between citizens of different states, even when the local law of another state would be applicable under usual choice of law principles. The Florida intermediate state court expressly held that choice of law principles were irrelevant. Based on this aberrant holding, the Eleventh Circuit vacated its previous holding and followed the Florida state case in granting judgment for attorney's fees. In doing so, the Eleventh Circuit ignored the choice of law inquiry mandated by *Erie R.R. Co. v. Tompkins* and *Day & Zimmerman.* Furthermore, the Eleventh Circuit's determination is at odds with a well-reasoned decision of the Tenth Circuit and there is now a split in the determinations of the circuit courts as to how to apply state attorney fee statutes in diversity cases.

This case presents the following questions:

1. Is a federal court, when exercising diversity jurisdiction, required to consider the forum state's choice of law rules in ascertaining which state's substantive law to apply, when the forum state's substantive law has been interpreted as applying to all actions brought in the state irrespective of its choice of law rules?

2. Does a federal court, when exercising diversity jurisdiction, contradict federal law by applying the law of the forum state without conducting the required choice of law analysis to determine whether to apply the substantive law of the forum state or the state's law which governs the underlying claim?

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OPINIONS BELOW

The opinion of the Court of Appeals reversing the trial court's grant of attorney's fees (App. *infra* 26a) is reported at 256 F.3d 1120 (11th Cir. 2001). The reversal by the Court of Appeals of its decision concerning attorney's fees (App., *infra* 3a) is reported at 311 F.3d 1077 (11th Cir. 2002). The Court of Appeals denied rehearing and rehearing en banc (App., *infra* 1a) in a decision dated January 7, 2003 and as yet unreported. The opinion of the district court (App., *infra* 60a) is unreported.

JURISDICTION

The Court of Appeals' judgment in granting attorney's fees was entered on November 6, 2002. A timely petition for rehearing and rehearing en banc was denied on January 7, 2003 (App., *infra* 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

Fla. Stat. §768.79 is reproduced at App., *infra,* 99a.

STATEMENT

This was a diversity action for tortious interference with contractual relations. Respondent allegedly caused petitioners' former limited partners to sue petitioners. The bringing of said action violated assignments and releases contained in Contracts of Sale and Security Agreements (the "Contracts") whereby said limited partners sold their interests to petitioners.

Respondent twice unsuccessfully moved for summary judgment dismissing the action on the ground of collateral estoppel. However, on the eve of trial the district court granted

summary judgment dismissing the complaint on precisely the same grounds rejected twice previously.

After the trial court first denied summary judgment, respondent served an Offer of Judgment (the "Offer") under Fla. Stat. §768.79 whereby respondent offered to settle the case for the payment of $100 to petitioners. Petitioners did not accept the Offer. Fla. Stat. §768.79 states in pertinent part: "In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendants shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf... if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer..."

The trial court awarded attorney's fees in excess of $260,000 (App. 22a) under Fla. Stat. §768.79 despite the fact that Virginia law governed the underlying claim. Virginia law does not provide for the award of attorney's fees.

The Eleventh Circuit reversed the trial court's award of attorney's fees. The Eleventh Circuit correctly set forth the required two step inquiry under federal law to determine whether Fla. Stat. §768.79 was applicable (256 F.3d at 1131):

> As a federal court exercising diversity jurisdiction, we engage in a two-step inquiry to determine if Fla. Stat. §768.79 is applicable. See *Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency,* 174 F.3d 1115, 1118 (10th Cir. 1999); *Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc.,* 145 F.3d 463, 479 (1st Cir. 1998). In the first step, we determine whether the matter at hand is

> procedural or substantive for *Erie R.R. Co. v. Tompkins* purposes. 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). If the matter is procedural then federal law will apply; but if the matter is substantive, then we will apply the law of the forum state. See *Erie,* 304 U.S. at 78, 58 S.Ct. at 822 (a federal court sitting in diversity applies state substantive law). If we do determine that the matter is substantive, we examine the substantive law of the forum state, which includes its choice-of-law rules, to ascertain the applicable substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496, 61 S. Ct. 1020, 1021, 85 L.Ed. 1477 (1941); *Boyd,* 174 F.3d at 1118; *Servicios,* 145 F.3d at 479.

The Eleventh Circuit first determined that (*Id.* at 1132) "[i]t is clear that statutes allowing for recovery of attorney's fees are substantive for *Erie* purposes."

With respect to the second step of the inquiry, the Eleventh Circuit determined that, under Florida choice of law principles, *(Ibid.)* "the availability of attorney's fees should be determined under the state law which also governs the underlying claim". This was because, under Florida's choice of law rules, when the law of another state governs the underlying claims a court may apply Florida law only if the Florida statute is "procedural" (*id.* at 1133). The Eleventh Circuit concluded that, based on numbers of Florida Supreme Court and intermediate appellate court cases, Fla. Stat. §768.79 was a substantive law and therefore Virginia law governed the issue of attorney's fees (*Id.* at 1132-33). Since Virginia does not have an Offer of Judgment statute, the Eleventh Circuit reversed the district court's grant of attorney's fees.

Prior to the mandate being issued, an intermediate Florida appellate court decided *BDO Seidman v. British Car Auctions,* 802 So.2d 366 (Fla. 4th DCA 2001). *Seidman* involved a state court action between citizens of different states where Tennessee substantive law controlled. In holding that any civil action filed in the Florida state courts was subject to Fla. Stat. §768.79, irrespective of which state's law governed the underlying claim, *Seidman* specifically refused to engage in the choice of law analysis required under federal law or to determine whether Fla.Stat. §768.79 was a substantive or procedural statute. *Seidman* held (802 So. 2d at 368):

> Section 768.79 (1), Florida Statute (1991), applies to "*any* civil action for damages filed in the courts of this state," (emphasis supplied.) This statute is clear and on its face is applicable to this action for damages.*** We conclude that, because the statute is clear, it should be applied without engaging in a conflict of laws analysis.

The *Seidman* court further stated that (Id at 369) "'the court will apply a local statute in the manner intended by the legislature *even when the local law of another state would be applicable*

under usual choice-of-law principles.'" [Emphasis in original][1]

Based on *Seidman*, the Eleventh Circuit reversed its prior determination and held that Fla.Stat. §768.79 applied in this case, *see* 311 F.3d 1077 (11th Cir.2002). Without analysis, the court simply concluded that (311 F.3d at 1080) "we are bound to follow decisions of the state's intermediate appellate courts". The Eleventh Circuit thereby eschewed the choice of law analysis required under federal law to determine whether Fla.Stat. §768.79 applied in this case. Moreover, in holding that it was required to blindly follow *Seidman,* the Eleventh Circuit ignored the absence of any holding in *Seidman* which would have caused the Circuit Court to reverse its choice of law analysis mandated by this Court.

REASONS FOR GRANTING THE PETITION

The petition for a writ of certiorari should be granted under this Court's Rule 10 for three reasons. First, the Eleventh Circuit (Rule10(c)) "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

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[1] *BDO Seidman* consists of separate opinions by each of the three judges, including one dissenting opinion. The court's determination, written by Judge Klein, was only concurred in "specially" by Judge Gross. Judge Gross opined that, under a choice of law analysis, Fla. Stat. §768.79 was procedural. Judge Gross' opinion was not concurred in by Judge Klein, who specifically refused to engage in a choice of law analysis, or, or course, by the dissenting judge. Consequently, Judge Gross' special concurrence stands alone and therefore "has no precedential value..." *Greene v. Massey,* 384 So.2d 24, 27 (Fla. 1980), *Accord: Greene v. Massey,* 706 F.2d 548, 550 (5th Cir. 1983), *cert. denied* 464 U.S. 1046, 104 S.Ct. 718, 79 L.Ed.2d 180 (1984); *Dozier v. Wild,* 659 So. 2d 1103, 1104 fn. 1 (Fla. 4th DCA 1995), *quashed on other grounds* 672 So.2d 16 (Fla. 1996): "It is axiomatic that a special concurring opinion has no binding effect as precedent and represents only the personal views of its author."; *Lendsay v. Cotton,* 123 So. 2d 745, 746 (Fla. 3d DCA 1960) (same)

Second, the Eleventh Circuit (Ibid) "has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power" Third, the Eleventh Circuit (Rule10(a)) "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter".

A. In Reversing its Prior Opinion Denying Attorney's Fees, The Eleventh Circuit Has Contradicted Federal Law by Applying the Law of the Forum State Without Conducting The Required Choice of Law Analysis

As a federal court exercising diversity jurisdiction, the Eleventh Circuit was required to engage in a two-step inquiry to determine if Fla. Stat. §768.79 is applicable. The first step is to determine if Fla.Stat. §768.79 is procedural or substantive for purposes of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). If the statute is substantive, then the court is required to apply the forum state's law, including its choice of law rules, to ascertain the applicable substantive law. *Day & Zimmerman, Inc. v. Challoner,* 423 U.S. 3, 96 S. Ct. 167, 46 L.Ed.2d3 (1975); *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 61 S. Ct. 1020, 85 L.Ed. 1477 (1941); *McMahan v.* Toto, 256 F.3d 1120 (11th Cir. 2001), *amended* 311 F.3d 1077 (11th Cir. 2002); *Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.,* 92 F.3d 1110, 1115 (11th Cir. 1996).

The Eleventh Circuit initially followed the above precedents in this case. It first held (256 F.3d at 1131) that Fla. Stat. §768.79 was substantive for *Erie* purposes. It further and correctly held that, under Florida's choice of law rules, substantive matters are governed by the state law which also governs the underlying claim. See *Prestige Rent-A-Car, Inc. v.*

Advantage Car Rental & Sales, Inc., 656 So.2d 541, 544 n. 2 (Fla. 5th DCA 1995); *Aerovias Nacionales DeColombia, S.A. v. Tellez,* 596 So.2d 1193, 1195 (Fla. 3d DCA 1992); *Guirlinger v. Goldome Realty Credit Corp.*, 593 So.2d 135, 1136 n. 1 (Fla. 1st DCA 1992); Restatement (Second) of Conflicts of Law §122.

The Eleventh Circuit also originally concluded, based on citations to numerous Florida Supreme Court and intermediate appellate court decision, that Fla. Stat. §768.79 was a substantive law since it modifies the substantive rights of the parties (256 F.3d at 1132-33). *See TGI Friday's, Inc. v. Dvorak,* 663 So.2d 606, 611 (Fla. 1995); *Montalvo v. Travelers Indem. Co.*, 643 So. 2d 648, 651 (Fla. 5th DCA 1994); *Andrews v. Continental Ins. Co.*, 444 So. 2d 479 (Fla. 5th DCA 1984); *Hirsch v. Hirsch,* 369 So.2d 407 (Fla. 3d DCA 1979). Accordingly, the Eleventh Circuit held that under Florida's choice of law rules, Virginia law and not Fla. Stat. §768.79 would apply to a case governed by the substantive law of Virginia. Since Virginia does not have an Offer of Judgment statute, the analysis mandated by the United States Supreme Court compelled the Eleventh Circuit to reverse the lower court's grant of attorney's fees.

In blindly following *BDO Seidman v. British Car Auctions,* 802 So.2d 366 (Fla. 4th DCA 2001), the Eleventh Circuit violated this Court's rulings that, in a diversity action, the federal court must engage in a choice of law analysis so as to determine whether to apply the law of the forum state or another state's law. *BDO Seidman* was not relevant precedent and should not have caused the Eleventh Circuit to alter its original decision reversing the lower court's grant of attorney's fees. In holding that any civil action filed in the Florida state courts was subject to Fla. Stat. §768.79, irrespective of what state's law governed, *Seidman* specifically refused to engage in the choice of law analysis required under federal law (*see* pp.4-

5, *supra*). Moreover, *Seidman* did not consider or alter Florida law that Fla. Stat 768.79 was substantive for choice of law purposes. Nor, of course, did *Seidman* alter Florida's choice of law rule that Florida's substantive law does not apply in a case otherwise governed by the substantive law of another jurisdiction. The Eleventh Circuit has thereby created a dangerous precedent by applying the law of the forum state without conducting the required choice of law analysis.

The Supreme Court has not passed on the issues raised by this case. However, in the analogous case of *Burlington Northern Railroad Company v. Woods,* 480 U.S. 1, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987), certiorari was granted to consider the Eleventh Circuit's application of an Alabama mandatory affirmance penalty statute which conflicted with Rule 38 of the Federal Rules of Civil Procedure. This Court held, *inter alia,* that the Alabama statute was inapplicable under *Erie,* just as the holding in *BDO Seidman* is inapplicable under *Erie's* progeny.

Therefore, the application for a writ of certiorari should be granted under Rule 10(a) and (c) because (i) the Eleventh Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court" (Rule 10(c)) and (ii) the Eleventh Circuit "has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's supervisory power" (Rule10(a)).

B. The Eleventh Circuit's Determination Conflicts With a Determination Made By The Tenth Circuit

Further militating in favor of the grant of certiorari is the fact that the Eleventh Circuit's ruling conflicts with the decision of the Tenth Circuit. Oklahoma's attorney fee statute is strikingly similar to Florida's. 12 Okl. Stat. §636 provides: "In any civil action to recover for labor or services rendered, or

on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs." Despite the wording "In any civil action", the Tenth Circuit in *Boyd Rosene and Associates v. Kansas Municipal Gas Agency,* 123 F.3d 1351 (10th Cir. 1997)(En banc), held that a federal court could not automatically apply the forum state's statute in respect of the award of attorney's fees, but (123 F.3d at 1353) "must first apply the forum state's choice-of-law rules in resolving attorney's fees issues."

Manifestly, the Tenth Circuit's determination is consistent with the relevant decisions of this Court. However, there now is a split in the determinations of the Circuits as to how to apply state attorney fee statutes in diversity cases.

Conflicting circuit court decisions is "a substantial reason for granting certiorari under this Court's Rule 10." *Yee v. City of Escondido, Ca.,* 503 U.S. 519, 538, 112 S.Ct. 1522, 1534, 118 L.Ed.2d 153 (1992). *Accord: Commissioner of Internal Revenue v. Lundy,* 516 U.S. 235, 116 S.Ct. 647, 133 L.Ed.2d 611 (1996). This Court should resolve this split in authority and reaffirm the general requirement that a federal court exercising diversity jurisdiction must engage in the two-step inquiry to determine which state's law is applicable, including the forum state's choice-of-law rules.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: March 3, 2003

Respectfully submitted:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10323-FF

D. BRUCE MCMAHAN
NEMESIS VERITAS, f.k.a.,
Mcmahan & Company,

Plaintiffs-Appellants,

versus

WILLIAM A. TOTO,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: CARNES and MARCUS, Circuit Judges, and HAND*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

*Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation.

ORD-42
(12/01)

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311 F.3d 1077
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(Cite as: 311 F.3d 1077)

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

D. BRUCE McMAHAN, Nemesis Veritas, f.k.a.,
McMahan & Company,
Plaintiffs-Appellants,
v.
William A. TOTO, Defendant-Appellee.
D. Bruce McMahan, Nemesis Veritas, f.k.a
McMahan & Company, Plaintiffs-Appellants-
Cross-Appellees,
v.
William A. Toto, Defendant-Appellee-Cross-Appellant.

Nos. 00-10323, 00-14728.

Nov. 6, 2002.

Limited partnership and general partner sued a limited partner for tortious interference with contractual relations, based on his actions in instituting action under the Racketeer Influenced and Corrupt Organizations Act (RICO) and encouraging other limited partners to participate in that lawsuit. The United States District Court for the Southern District of Florida, No. 96-08294-CV-DMM, Donald M. Middlebrooks, J., granted summary judgment to limited partner and entered various orders relating to fees, costs, and sanctions. Plaintiffs appealed

and defendant cross-appealed. The Court of Appeals, 256 F.3d 1120, affirmed in part and reversed in part. Petition for rehearing was filed. On rehearing, the Court of Appeals, Carnes, Circuit Judge, held that: (1) court had authority to modify its opinion to comport with subsequent contrary decision issued by Florida District Court of Appeal; (2) Florida's offer of judgment statute is applicable to cases that are tried in Florida even if the substantive law that governs the case is that of another state; (3) failure of limited partner's settlement offer to mention attorney fees did not preclude fee award; (4) offer was not made in bad faith; and (5) limited partner was not entitled to attorney fees for time spent litigating amount of fees due.

Prior decision rescinded in part; affirmed in part and remanded in part.

West Headnotes

[1] Federal Courts k383
170Bk383

Absent a decision from the state supreme court on an issue of state law, the federal Court of Appeals is bound to follow decisions of the state's intermediate appellate courts, unless there is some persuasive indication that the highest court of the state would decide the issue differently.

[2] Federal Courts k925
170Bk925

In a diversity case, Court of Appeals is bound to follow any changes in a state's decisional law that occur during the case.

[3] Federal Courts k925
170Bk925

[3] Federal Court k931
170Bk931

Court of Appeals exercising diversity jurisdiction had authority, power, and duty to modify its opinion to comport with subsequent contrary decision issued by state intermediate appellate court, though Court of Appeals had denied petition for rehearing, where federal Court of Appeals had not yet issued mandate returning case to district court.

[4] Federal Court k415
170Bk415

Florida's offer of judgment statute is applicable to cases that are tried in Florida even if the substantive law that governs the case is that of another state. West's F.S.A. §768.79.

[5] Federal Courts k744
170Bk744

Petition for rehearing of Court of Appeals decision following state appellate court opinion that was directly on point, controlling, and contrary to federal decision would be considered, though petition was not filed within 21 days of entry of judgment as required by rule; state opinion was compelling reason to extend filing time.

[6] Costs k194.50
102k194.50

Fact that limited partner's offer to settle tortious interference claims failed to state whether it included claims for attorney fees and costs did not preclude award of attorney fees to limited partner under Florida offer of judgment statute; offer did not specifically exclude attorney fees, and stated that if accepted, it would be in full and final resolution of all claims made in the action. West's F.S.A. §768.79.

[7] Federal Courts k776
170Bk776

Court of Appeals reviews *de novo* a district court's interpretation of a state law.

[8] Costs k42(2)
102k42(2)

Under Florida law, where a settlement offer explicitly excludes attorney fees, it is invalid because the total amount of the proposal is not stated. West's F.S.A. RCP Rule 1.4442.

[9] Costs k42(2)
102k42(2)

Under Florida law, where a settlement offer does not explicitly exclude attorney fees, they are assumed to be included. West's F.S.A. RCP Rule 1.4442.

[10] Costs k42(2)
102k42(2)

Under Florida law, fact that limited partner's offer to settle tortious interference claims did not specifically mention

punitive damages did not render offer invalid; offer did not explicitly exclude punitive damages, and stated that if accepted, it would be in full and final resolution of all claims made in the action. West's F.S.A §768.79; West's F.S.A. RCP Rule 1.4442.

[11] Costs k194.50
102k194.50

Limited partner's offer to settle limited partnership's tortious interference claims, which alleged that partner induced other limited partners who had released partnership from liability to join him in suit against partnership, was not made in bad faith, as would permit court to disallow attorney fee award to limited partner under Florida offer of judgment statute, though offer was only for nominal amount of $100; limited partner was reasonable in concluding that partnership could not prevail on its claim, based on finding of court in prior New York action that releases signed by other limited partners were not breached. West's F.S.A §768.79.

[12] Costs k194.50
102k194.50

Under Florida law, if an offer satisfies the requirements of the Florida offer of judgment statute, the sole basis on which a court can disallow an entitlement to an award of attorney fees as if it determines that the offer was not made in good faith. West's F.S.A. §768.79.

[13] Federal Courts k878
170Bk878

Court of Appeals review only for clear error district court's

finding that offeror acted in good faith as required to obtain attorney fees under Florida offer of judgment statute. West's F.S.A. §768.79.

[14] Costs k207
102k207

Under Florida law, burden is upon settlement offeree to prove that the offeror acted without good faith, as would preclude award of attorney fees to offeror under Florida offer to judgment statute. West's F.S.A. §768.79.

[15] Costs k42(2)
102k42(2)

Although nominal offers are suspect under the Florida offer of judgment statute where they are not based on any assessment of liability and damages, they can be valid if the offerors have a reasonable basis at the time of the offer to conclude that their exposure was nominal. West's F.S.A. §768.79.

[16] Costs k42(2)
102k42(2)

Good faith requirement of Florida offer of judgment statute demands that an offeror necessarily possess, at the time he makes an offer or demand under the statute, the kind or quantum of evidence needed to support a judgment; the obligation of good faith merely insists that the offeror have some reasonable foundation on which to base an offer. West's F.S.A. §768.79.

[17] Federal Courts k830
170Bk830

Court of Appeals reviews only for abuse of discretion the amount of attorney fees awarded by the district court.

[18] Cost k194.50
102k194.50

For purposes of calculating attorney fee award to offeror of settlement under Florida offer of judgment statute, attorney's 10% discount of his fees was only on offeror's outstanding balance, and did not include fees already paid. West's F.S.A. §768.79.

[19] Cost k194.50
102k194.50

Under Florida law, district court did not abuse its discretion in awarding to settlement offeror, who ultimately prevailed on summary judgment, attorney fees incurred after date offeror's attorney executed affidavit, which limited fees after date summary judgment was entered; affidavit was ambiguous as to whether it was only limiting fees between dated of summary judgment and affidavit, or after date of summary judgment to any time in future. West's F.S.A. §768.79.

[20] Costs k194.50
102k194.50

Settlement offeror who ultimately prevailed on summary judgment was not entitled to attorney fees, under the Florida offer of judgment statute, for time spent litigating amount of

fees due. West's F.S.A. §768.79.

[21] Costs k42(2)
102k42(2)

Purpose of Florida offer of judgment statute is to terminate all claims, end disputes, and obviate the need for further intervention of the judicial process by encouraging parties to exercise their organic right to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise. West's F.S.A. §768.79.

*1079 Patti E. Evans, Leigh R. Isaacs, New York City, for Plaintiffs-Appellants.

Hendrik G. Milne, Aballi, Milne, Kalil & Garrigo, P.A., Miami, Fl, for Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Florida

ON PETITION FOR REHEARING

Before CARNES and MARCUS, Circuit Judges, and HAND [FN*], District Judge.

> FN* Honorable William B. Hand, U.S. District Judge for the Souther District of Alabama, sitting by designation.

CARNES, Circuit Judge:

Recent events in this case illustrate that "when we write to a state law issue, we write in faint and disappearing ink."

Sultenfuss v. Snow, 35 F.3d 1494, 1504 (11th Cir.1994) (en banc) (Carnes, J., dissenting). The disappearing ink here is that which we used in our previous opinion in this case to express our holding about whether the *1080 Florida Supreme Court would apply its offer of judgment statute, Fla. Stat. §768.79, in a case tried in Florida but for which the substantive law of another state governed. There were no Florida decisions on point, and we made an *Erie* guess that the Florida Supreme Court would not apply the statute in those circumstances. As a result, we reversed the part of the district court's judgment awarding attorney's fees under the statute. *McMahan v. Toto,* 256 F.3d 1120, 1130-35 (11th Cir. 2001).

1. THE APPLICABILITY OF THE OFFER OF JUDGMENT STATUTE

[1] Our earlier opinion was barely in the hardback books when the Fourth District Court of Appeal in Florida issued a decision disagreeing with our estimate of Florida law. *See BDO Seidman, LLP v. British Car Auctions, Inc.,* 802 So.2d 366 (Fla. 4th DCA 2001), *review denied,* (Fla. Sept. 24, 2002) (No. SC02-96). If the *BDO Seidman* decision had been around when we issued our first decision in this case, we would have followed it. We would have been compelled to do so because the rule is that, absent a decision from the state supreme court on an issue of state law, we are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently. *See Galindo v. ARI Mut. Ins. Co.,* 203 F.3d 771, 775 (11th Cir.2000); *Trumpet Vine Invs., N.V. v. Union Capital Partners I, Inc.,* 92 F.3d 1110, 1120 (11th Cir.1996); *Williams v. Singletary,* 78 F.3d 1510, 1515 (11th Cir.1996). That rule is, if anything, particularly appropriate in

Florida, where the state's highest court has held that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court]." *Pardo v. State,* 596 So.2d 665, 666 (Fla.1992) (quoting *Stanfill v. State,* 384 So.2d 141, 143 (Fla.1980)).

There is no persuasive indication that the Florida Supreme Court would not follow the Fourth District Court of Appeal's *BDO Seidman* decision on whether its offer of judgment statute, Fla. Stat. §768.79, applies when the case is governed by the substantive law of another state. The fact that we decided the issue differently is not a persuasive indication that Florida Supreme Court would agree with us and not with one of its own intermediate appellate courts, which presumably knows more about Florida law than we do. Nor is the fact that one of the three judges dissented on this point in *BDO Seidman,* 802 So.2d at 374 (Polen, C.J., dissenting), a persuasive indication that the Florida Supreme Court would decide the issue differently. Two is a majority of three, and a majority of participating judges controls a court's decision. *See* Fla. R. Jud. Admin. 2.040(a)(1) (2002) ("Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision."). The holding in *BDO Seidman* is and will remain Florida law until such time, if any, as the Florida Supreme Court has the inclination and opportunity to rule to the contrary.

[2][3] Of course, at the time we issued our decision in this case we did not have the benefit of the *BDO Seidman* decision, which was released on the very day we denied the petition for rehearing and suggestion for rehearing en banc in this case. In a diversity case, however, we are bound to follow any changes

in a state's decisional law that occur during the case. *See Huddleston v. Dwyer,* 322 U.S. 232, 236, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246 (1944); *see also Technical Coating Applicators, Inc. v. *1081 United States Fid. & Guar. Co.,* 157 F.3d 843, 845 (11th Cir.1998) ("Intervening state decisions must have given full effect as if the decisions existed during the pendency of the case in district court."). We still have the authority, power, and duty to modify our decision to comport with the latest word from the Florida courts even though we have already denied rehearing, because we have not yet issued the mandate returning the case to the district court. The case is still before us and we can correct our missed guess about Florida law.

[4][5] In light of the *BDO Seidman* decision, we rescind Part II.D of our prior decision, 256 F.3d at 1130, and in its place we hold that Florida's offer of judgment statute, Fla. Stat. §768.79, is applicable to cases, like this one, that are tried in the State of Florida even though the substantive law that governs the case is that of another state. [FN1]

FN1. MBM and McMahan contend we should not reconsider our prior decision because Toto's motion to do so is ultimately under 11th Circuit Rules 35-2 and 40-3. Although both rules provide that petitions for rehearing "must be filed within 21 days of entry of judgment" (R. 35-2 addresses petitions for en banc rehearings; R. 40-3 addresses panel rehearings), they also state that counsel can "request extensions of time ... for the most compelling reasons." We conclude the issuance of *BDO Seidman* by the Fourth District Court of Appeal of Florida is a

> "most compelling reason," given that it is directly on point with this case, is controlling, and is directly contrary to our previous decision in this case. Therefore, Toto's motion is not time-barred.

We turn now to the contentions raised by MBM and McMahan in this appeal that we did not reach in our previous opinion because of our no longer viable holding that Fla. Stat. §768.79 was inapplicable in this case. Many of these born-again contentions are not sufficiently viable to warrant discussion because they either are so clearly without merit, or they are without merit and are of insufficiently general application, to warrant discussion in a published opinion. Those not mentioned are summarily rejected.

Some of the contentions we did not reach in our earlier opinion do warrant discussion, and some even have merit. For reasons we will discuss, we are going to remand this case for further proceedings relating to the amount of attorney's fees that should be awarded. Accordingly, we also rescind Part III(3) of our prior decision, 256 F.3d at 1135, and replace it with the conclusion at the end of this opinion.

II. THE DETERMINATION OF ENTITLEMENT

A. WHETHER THE OFFER WAS FACIALLY VALID

[6][7] MBM and McMahan contend the district court erred by awarding Toto any attorney's fees and costs because his offer was facially defective in several ways. Toto's offer of judgment provided as follows:

Defendant, WILLIAM A. TOTO, hereby offers pursuant to Fla. Stat. §45.061 to settle this case for the amount of $100.00 (One

Hundred Dollars) upon a stipulation for dismissal, or, alternatively, pursuant to Fla. Stat. §768.79, at Plaintiff's election, to allow judgment to be taken against him in the total sum of $100.00 (One Hundred Dollars), in full and final resolution of all claims made in this action.
We review *de novo* a district court's interpretation of a state law. *Fioretti v. Mass. Gen. Life Ins. Co.,* 53 F.3d 1228, 1234 (11th Cir.1995).

First, MBM and McMahan contend the offer was invalid because it failed to state *1082 whether it included their claims for attorney's fees and costs and Toto's own claims for costs in his answer.

[8][9] Florida Rule of Civil Procedure 1.442 governs settlements and provides that a settlement proposal must "state the total amount of the proposal ... [and] state whether the proposal includes attorney's fees. "Fla. R. Civ. P. 1.442(c)(2)(D) and (F). That rule applies to offers made pursuant to §768.79. *See United Servs. Auto. Ass'n v. Behar,* 752 So.2d 663 (Fla.2d DCA 2000). Where an offer explicitly excludes attorney's fees, it is invalid because the total amount of the proposal is not stated. *See State Farm Life Ins. Co. v. Bass,* 605 So.2d 908, 910 (Fla.3d DCA 1992) (holding offer of judgment stating that attorney's fees and costs were to be determined at a later date did not satisfy Rule 1.442). But where an offer does not explicitly exclude attorney's fees, they are assumed to be included. *See Unicare Health Facilities, Inc. v. Mort,* 553 So.2d 159, 161 (Fla.1989) (stating that "[t]here is an organic right of parties to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise"); *George v. Northcraft,* 476 So.2d 758, 759 (Fla. 5th DCA 1985) ("We think the right to an award of

attorney's fees ... is encompassed in an offer of judgment ... which fails to mention them specifically or reserve a right to seek them later.").

Toto's offer did not specifically exclude attorney's fees. Further, it stated that it would be "in full and final resolution of *all claims made in this action*" (emphasis added), and that language is broad enough to cover both MBM and McMahan's claims for costs and attorney's fees, and Toto's own claims for costs. *See Liberty Mut. Fire Ins. Co. v. Ramos*, 565 So.2d 798, 800 (Fla. 4th DCA 1990) (where offer did not specifically mention attorney's fees, holding that "when Ramos made the offer of settlement ... the amount of money demanded necessarily included attorney's fees. If it were otherwise, the claims would not be terminated, the disputes would not be at an end, and the judicial process would be needed to intervene to resolve the disputed amount of attorney's fees."). Therefore, the offer of judgment was not invalid for failure to cover costs and attorney's fees.

[10] Second, MBM and McMahan contend that Toto's offer was invalid because it failed to state with particularity the amount, if any, applicable to the claim for punitive damages. Both §768.79 and Rule 1.442 provide that an offer must state with particularity the amount, if any, offered to settle a claim for punitive damages. Fla. Stat. §768.79(2)(c); Fla. R. Civ. P. 1.442(c)(2)(E). Toto's offer did not specifically mention punitive damages, but it did state that, if accepted, it would be "in full and final resolution of all claims made in this action."

Florida courts have not addressed whether an offer that does not specifically address punitive damages can be valid under §768.79 and Rule 1.442, but their approach to the attorney's

fees requirement of Rule 1.442 is instructive. Rule 1.442(c)(2)(F) does say that offers should state whether they include attorney's fees, yet Florida courts have held those fees are included in offers where they are not mentioned as long as they are not specifically excluded. *See Unicare Health Facilities,* 553 So.2d at 161; *Northcraft,* 476 So.2d at 759.

Extending that logic to the context of the punitive damages requirements of §768.79(2)(c) and Rule 1.442(c)(2)(E)--and there is no apparent reason we should not--we conclude that Toto's offer satisfied those requirements because it did not explicitly exclude punitive damages from *1083 its coverage. If simple omission were not enough, the "final resolution" language of the offer is. The offer was not invalid under §768.79 and Rule 1.442.

B. WHETHER THE OFFER WAS MADE IN BAD FAITH

[11][12] If an offer satisfies the requirements of §768.79(1)-(6), as this one did, "[t]he sole basis on which a court can disallow an entitlement to an award of fees is if it determines that [the] offer was not made in good faith." *Levine v. Harris*, 791 So.2d 1175, 1177 (Fla. 4th DCA 2001); *see also* §768.79(7)(a) ("If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees."). The district court found that Toto's offer was made in good faith because "an appellate court of New York had ... held that the Releasors had not breached their contracts," which means Toto "was reasonable in concluding the Plaintiffs could not make out their remaining claim of tortious interference, breach of contract being an essential element of that claim."

MBM and McMahan contend Toto's offer was made in bad faith because, at the time Toto made his offer, he had no reasonable basis for making it. At that time, although the New York court had entered its decision in *McMahan & Co. v. Bass,* 250 A.D.2d 460, 673 N.Y.S.2d 19 (N.Y.App.Div.1998), the district court had since denied Toto's motion for summary judgment on the tortious interference claim based on the *Bass* decision. That means, according to MBM and McMahan, "the validity of appellants' claim had been confirmed by the trial court, Toto was facing millions of dollars of potential liability and appellants had incurred thousands of dollars in legal fees incurred during three years of litigation" so "the $100 Offer could not be *bona fide.*"

[13][14] We review only for clear error the district court's finding that Toto acted in good faith, *Turner v. Orr,* 759 F.2d 817, 821 (11th Cir. 1985), and "[t]he burden is upon the offeree to prove that the offeror acted without good faith," *Levine,* 791 So.2d at 1178 (citing *Schmidt v. Fortner,* 629 So.2d 1036, 1041 n.6 (Fla.4th DCA 1993), *approved by TGI Friday's, Inc. v. Dvorak,* 663 So.2d 606, 613 (Fla.1995)). Here, the offerees did not come close to carrying their burden of proof in the district court, and they are even further from convincing us that the district court clearly erred in deciding this issue against them.

[15][16] Toto offered $100.00, a nominal amount. Although "nominal offers are suspect where they are not based on any assessment of liability and damages," *Fox v. McCaw Cellular Communications of Fla., Inc.,* 745 So.2d 330, 332 (Fla. 4th DCA 1998), they can be valid if the offerors have "a reasonable basis at the time of the offer to conclude that their exposure was nominal." *Id.* at 333. The good faith requirement of §768.79(7)(a) does not "demand that an offeror necessarily

possess, at the time he makes an offer or demand under the statute, the kind or quantum of evidence needed to support a judgment. The obligation of good faith merely insists that the offeror have some reasonable foundation on which to base an offer." *Schmidt*, 629 So.2d at 1039.

The argument of MBM and McMahan that Toto lacked any reasonable basis for believing that he would prevail against them ignores the inconvenient fact that he did prevail against them. To accept in the same case in which a party did prevail the notion that there was no reasonable basis for that party prevailing would require *1084 self-contradiction on a scale that we are unwilling to consider. It is MBM and McMahan's argument that is illogical, and thus unreasonable.

III. THE DETERMINATION OF AMOUNT

[17] We review only for abuse of discretion the amount of attorney's fees awarded by the district court. *See Farley v. Nationwide Mut. Ins. Co.*, 197 F.3d 1322, 1340 (11th Cir.1999). The district court awarded Toto $260,034.29 in attorney's fees and costs. MBM and McMahan challenge that award on several grounds, only some of which merit discussion here.

A. WHETHER THE REQUESTED AMOUNT WAS INFLATED

[18] MBM and McMahan contend that Toto's calculations of the amount of attorney's fees to which he was entitled was inflated by more than $70,000. They assert that on March 6, 2000, Toto's counsel discounted all of his attorney's fees to $136,103.54. They claim Toto's fee application sought that amount plus $51,394.76 in subsequent invoices, and that those

figures totaled $187,498.30, not the $260,447.72 requested by Toto.

Toto disagrees with MBM and McMahan about the March 6, 2000 discount and, therefore, about the total amount sought. According to Toto, as of March 6, 2000, he had paid $71,730 in attorney's fees and had an outstanding balance of $151,226.16. He asserts that only the outstanding balance was discounted by ten percent (from $151,226.16 to $136,103.54), and that the $71,730 he had already paid was not affected by that discount. He says that for services up to March 6, 2000, he sought in his fee application $71,730 plus $136,103.54, which totals $207,833.54. Additionally, he sought $51,394.76 in subsequent invoices for fees incurred thereafter.

Our review of the Verified Bill of Fees and Costs shows that, as of March 6, 2000, Toto had been billed for attorney's fees and costs in the amount of $222,956.16 ($1,125.00 for May 1999; $1,941.04 for June 1999; $74,682.71 for July, August, September, and October 1999; and $145,207.41 for November and December 1999). The Verified Bill states that "[o]n March 6, 2000 ... [Toto's attorney] agreed ... to discount the *then outstanding balance* of $151,226.16 by ten percent to $136,103.54." (emphasis added). The term "outstanding balance" refers to the amount unpaid as of that date, *see* Black's Law Dictionary 1129 (7th ed. 1999); it does not refer to fees already paid. Therefore, any fees that were already paid were not affected by the ten-percent discount. Although the Verified Bill did not explicitly state that Toto had already paid $71,730, the implication was clear, because the $222,956.16 of attorney's fees and costs would reduce to an unpaid balance of $151,226.16 only if Toto had paid the difference of $71,730. Toto did not give up his claim to the full amount of the $71,730

he had already paid.

Adding the $71,730 that Toto had already paid to the $136,103.54 that resulted from the ten percent discount of the unpaid balance, and then adding to that sum the $48,282.26 of attorney's fees and costs from January, February, and March 2000, and the $3,112.50 anticipated for April 2000, the total comes to $259, 228.30. Because the district court had already awarded taxable costs of $4,799.33 pursuant to 28 U.S.C. §1920, that amount is subtracted from $259,228.30, and the balance is $254,428.97.

In the verified bill, Toto sought $260,447.72. That figure is erroneous according to our calculations, because it is $6,018.75 more than the $254,428.97 to *1085 which Toto was entitled. (There is no reason to think that the error is anything other than a mathematical one.) We will remand to the district court for it to reduce the amount of attorney's fees awarded Toto by $6,018.75.

B. WHETHER THE AWARD EXCEEDED THE REQUEST

[19] MBM and McMahan contend the district court's award of any attorney's fees beyond the $152,268.71 incurred as of December 21, 1999 was in error because Toto's counsel voluntarily limited the fee application to those incurred by that date. Toto's attorney's affidavit, submitted as part of the fee application, stated that he "cut off the claimed time immediately following the entry of the summary judgment [on December 21, 1999], even though the client has incurred fees to pursue the issue of entitlement to fees which is fairly recoverable."

That language could be plausibly interpreted in two ways. It could be construed to mean that any fees incurred from December 21, 1999 to any time in the future were "cut off," in the way MBM and McMahan insist. Or it could be read to mean that Toto was not going to seek fees incurred from December 21, 1999, to the date the affidavit was executed, January 20, 2000. Toto claims he initially decided to forego fees incurred during that period "in order to simplify the fee application--and in the hope that making such allowance would obviate a fight on reasonableness--which obviously has not happened." As a result of the dispute over fees, Toto now wants to recover fees incurred during that period and afterwards.

Although the district court did not explicitly address this issue, it is clear from its order that the court read the fee application as not limiting the recovery of attorney's fees to those incurred before December 21, 1999, because the amount awarded was $260,034.29, well in excess of the $152,268.71 incurred as of that date. Given the ambiguity of the attorney's fee affidavit, the district court did not abuse its discretion in allowing Toto to recover attorney's fees incurred after January 20, 2000. But the attorney's affidavit clearly excluded any fees incurred from December 21, 1999 to January 20, 2000, and Toto never amended his application to seek those fees. Therefore, fees from that period should not have been awarded, and we remand to the district court to determine that amount and subtract it from the attorney's fees award.

C. WHETHER FEES FOR LITIGATING FEES WERE PROPER

[20] Determining that time spent calculating the amount of attorney's fees due was not recoverable, the district court

lowered Toto's fees request by $905, which is the amount of attorney's fees billed for "preparing the fees application." MBM and McMahan contend the district court did not go far enough. They say that it should also have excluded any fees for litigating the issue of how much fees were due, which they calculate would have reduced the award by another $51,973.75.

The Florida Supreme Court has held that, while attorney's fees incurred for litigating the issue of entitlement to attorney's fees are recoverable, fees incurred for litigating the amount of attorney's fees are not. *State Farm Fire & Cas. Co. v. Palma,* 629 So.2d 830, 833 (Fla.1993). In the context of a contingency fee agreement, the *Palma* court explained that the work involved in litigating the amount of attorney's fees "inures solely to the attorney's benefit and cannot be considered services rendered in procuring full payment *1086 of the judgment." *Id.* It noted the contrary federal court practice of allowing recovery of attorney's fees for litigating both entitlement and amount issues, and it distinguished that practice based on different statutory purposes. The purpose underlying most federal statutory fee authorizations, the Court explained, is "to encourage attorneys to represent indigent clients," and allowing recovery for fees from litigating the amount of fees comports with that purpose. *Id.* In contrast, the Florida statute involved in that case has a different purpose--"to discourage the contesting of valid claims ... and to reimburse successful insureds for their attorney's fees," which led the Florida Supreme Court to the conclusion that the statute's purpose would not be furthered by permitting the award of attorney's fees incurred in litigating the amount of them due. *Id.* (internal quotation marks and citation omitted).

[21]In this case we deal with attorney's fees awarded pursuant

to §768.79, the purpose of which is "to 'terminate all claims, end disputes, and obviate the need for further intervention of the judicial process' by encouraging parties to exercise their 'organic right ... to contract a settlement, which by definition concludes all claims unless the contract of settlement specifies otherwise.'" *MGR Equip. Corp. v. Wilson Ice Enters., Inc.*, 731 So.2d 1262, 1264 (Fla.1999) (quoting *Unicare Health Facilities, Inc. v. Mort*, 553 So.2d 159, 161 (Fla.1989)). That purpose does not include encouraging the representation of indigents and does not support an award of attorney's fees incurred litigating the amount of those fees. *See also Diaz v. Santa Fe Healthcare, Inc.*, 642 So.2d 765, 766 (Fla. 1st DCA 1994) (holding that where at least one of the purposes of a statute awarding attorney's fees "is to encourage attorneys to represent indigent persons...the trial court has discretion...to make a fee award...which encompasses the time spent establishing the amount of the fee").

Toto attempts to distinguish *Palma* by noting that it concerned a contingency fee agreement, whereas "[t]his is an hourly fee case [and Toto's attorneys] will get paid ... regardless of any fee recovery." We are unpersuaded by that argument, because the Florida Supreme Court has explained that whether attorney's fees should be awarded for litigating the amount of fees due depends on the purpose of the statute under which the fees are sought; it does not depend on the method of calculating them. *Palma*, 629 So.2d at 833.

The district court should have decreased Toto's attorney's fee award by the amount spent litigating the amount of attorney's fees to which he was entitled. MBM and McMahan claim that amount is $51,973.75, but they do not tell us how they arrived at that figure. On remand the district court should determine the

amount of attorney's fees incurred by Toto in litigating the amount of attorney's fees, and subtract that amount from the fees to be awarded to him.

IV. CONCLUSION

We RESCIND Part II.D and Part III(3) of our prior decision, 256 F.3d at 1130-35, and replace them with the relevant parts of this opinion.

We REMAND this case to the district court for further proceedings in which it should: 1)decrease the attorney's fees award by $6,018.75 (Part III.A, *supra*); 2) determine the amount of attorney's fees incurred from December 21, 1999 to January 20, 2000, and subtract that amount from the attorney's fees award (Part III.B, *supra*); 3) determine the amount of attorney's fees incurred by Toto in litigating the amount of attorney's fees, and subtract *1087 that amount from the attorney's fees award (Part III.C, *supra*).

We AFFIRM all other aspects of the district court's orders and judgment.

311 F.3d 1077, 16 Fla. L. Weekly Fed. C 8

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256 F.3d 1120
14 Fla. L.Weekly Fed. C 944
(Cite as: 256 F.3d 1120)

United States Court of Appeal.
Eleventh Circuit.

D. Bruce McMAHAN, Nemesis Veritas, f.k.a McMahan & Company, Plaintiffs-Appellants,
v.
William A. TOTO, Defendant-Appellee.
D. Bruce McMahan, Nemesis Veritas, f.k.a McMahan & Company, Plaintiffs-Appellants, Cross-Appellees,
v.
William A. Toto, Defendant-Appellee, Cross-Appellant.

Nos. 00-10323, 00-14728.

July 10, 2001.

Limited partnership and general partner sued a limited partner for tortious interference with contractual relations, based on his actions in instituting action under the Racketeer Influenced and Corrupt Organizations Act (RICO) and encouraging other limited partners to participate in that lawsuit. The United States District Court for the Southern District of Florida, No. 96-08294-CV-DMM, Donald M. Middlebrooks, J., granted summary judgment to limited partner and entered various orders relating to fees, costs, and sanctions. Plaintiffs appealed and defendant cross-appealed. The Court of Appeals, Carnes,

Circuit Judge, held that: (1) a state court decision in plaintiffs' suit against former limited partners collaterally estopped plaintiffs from establishing that such limited partners, whom had allegedly been induced to sue by defendant, breached their contractual agreements in doing so; (2) the district court did not abuse its discretion in determining that plaintiffs did not engage in unreasonable and vexatious conduct, so as to warrant imposition of liability on counsel for excess cost and attorney fees; (3) the district court's refusal to award attorney's fees under the former version of the Florida frivolous litigation statute was not an abuse of discretion; and (4) the Supreme Court of Florida would not apply the Florida offer of judgment statute to a case where the substantive law of another state governs the underlying claim.

Affirmed in part and reversed in part.

West Headnotes

[1] Judgment k828.17(1)
228k828.17(1)

New York court's decision, in action by limited partnership and general partner against former limited partners for breach of contract in bringing a prior suit against the partnership and general partner, that the agreements the limited partners signed in connection with general partner's purchase of their interest constituted releases, and not covenants not to sue, collaterally estopped partnership and general partner, in a suit against another limited partner for tortious interference with contractual relations in inducing the other limited partners to sue, from establishing that the other limited partners breached their contractual agreements in doing so; because the New York

court had a statutory duty to dispose of all issues in the proceeding and the breach of contract claim was clearly raised in the pleadings, that claim actually was decided against partnership and general partner. N.Y.McKinney's CPLR 7804(g).

[2] Federal Courts k813
170Bk813

Court of Appeals reviews only for abuse of discretion the trial court's ruling on an award of sanctions for multiplying proceedings unreasonably and vexatiously. 28 U.S.C.A. §1927.

[3] Federal Courts k812
170Bk812

The abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment, Court of Appeals will not reverse even if it would have gone the other way had the choice been its to make.

[4] Federal Civil Procedure k2766
170Ak2766

The district court did not abuse its discretion in determining that plaintiffs did not engage in unreasonable and vexatious conduct, so as to warrant imposition of liability on counsel for excess costs and attorney fees, in arguing that they were not collaterally estopped by a state court decision, as that decision was not entirely clear and offered some support for plaintiffs' interpretation, though not enough to convince the Court of Appeals, and the district court twice denied summary judgment

to defendant on his collateral estopped theory before finally concluding that plaintiffs' reading of the state court decision was wrong. 28 U.S.C.A. §1927.

[5] Federal Civil Procedure k2766
170Ak2766

Something more than a lack of merit is required for award of sanctions for unreasonably and vexatiously multiplying proceedings. 28 U.S.C.A. §1927.

[6] Federal Courts k830
170Bk830

Generally, a district court's decision about whether to award attorney's fees, including award under Florida frivolous litigation statute, is reviewed for an abuse of discretion. F.S.1995, §57.105.

[7]Costs k4
102k4

Amendment to Florida frivolous litigation statute, adopted after the lawsuit was filed, was not relevant to this case. F.S.1995, §57.105.

[8] Costs k194.44
102k194.44

Even assuming Florida frivolous litigation statute applies in a case where the substantive law of another state governs the underlying claims, the district court's refusal to award attorney's fees under the former version of the statute, which

only allowed sanctions where there was a "complete absence of a justiciable issue of either law or fact raised by the complaint," was not an abuse of discretion, though suit was barred by collateral estoppel, where the decision having collateral estoppel effect was not filed until two years after the instant suit was filed. F.S.1995, §57.105.

[9] Federal Courts k776
170Bk776

Court of Appeals reviews de novo the district court's determination of state law in a diversity case.

[10] Federal Courts k373
170Bk373

[10] Federal Courts k409.1
170Bk409.1

A federal court exercising diversity jurisdiction engages in a two-step inquiry to determine if a state statute is applicable: in the first step, court determines whether the matter at hand is procedural or substantive for *Erie* purposes, and if the matter is procedural, federal law will apply, but it the matter is substantive, the law of the forum state applies, and if the matter is substantive, court examines the substantive law of the forum state, which includes its choice-of-law rules, to ascertain the applicable substantive law; however, that the two steps are independent of each other, and thus a finding that a matter is substantive or procedural for *Erie* purposes does not compel the same characterization for choice-of-law purposes.

[11] Federal Courts k415
170Bk415

Statutes allowing for recovery of attorney's fees are substantive for *Erie* purposes, so that law of the forum state applies.

[12] Costs k2
102k2

The Supreme Court of Florida would not apply the Florida offer of judgment statute to a case where the substantive law of another state governs the underlying claim; court would hold that statute is substantive law of choice-of-law purposes. West's F.S.A. §§45.061, 768.79; West's F.S.A. RCP Rule 1.442; Restatement (Second) of Conflict of Laws §122.

[13] Action k66
13k66

In applying Florida's choice-of-law rules, procedural matters are governed by Florida law, even where another forum's substantive law applies.

[14] Constitutional Law k50
92k50

[14] Constitutional Law k67
92k67

In Florida, the task of enacting procedural rules that apply even where another forum's substantive law governs is confined to the Supreme Court of Florida, but the Florida legislature is entrusted with the task enacting substantive laws, for choice-of-

law purposes.
*1122 Patti E. Evans, Leigh R. Isaacs, New York City, for Appellants.

Hendrik G. Milne, Aballi, Milne, Kalil & Garrigo, P.A., Miami, FL, for Toto.

Appeals from the United States District Court for the Southern District of Florida.

Before CARNES and MARCUS, Circuit Judges, and HAND [FN*], District Judge.

> FN* Honorable William B. Hand, U.S. District Judge for the Southern District of Alabama, sitting by designation

CARNES, Circuit Judge:

Along with several other limited partners in McMahan, Brafman, Morgan & Company ("MBM"), William A. Toto filed *1123 a RICO action in federal court in New York against that company and D. Bruce McMahan after the Internal Revenue Service imposed penalties and disallowed deductions related to the company that he and the other limited partners had claimed. Several of the limited partners in that suit were dismissed, because their claims were precluded by release and assignment provisions contained in agreements between them and McMahan, MBM's principal general partner, in which he bought back their partnership interests. McMahan and MBM subsequently brought suit in state court against those limited partners alleging that by participating in the RICO action they had breached the release and assignment provisions of their

agreements with him. The state court granted summary judgment in favor of the limited partners.

Before summary judgment was granted in the state court action, McMahan and MBM filed this diversity jurisdiction lawsuit in the Southern District of Florida against Toto for tortious interference with contractual relations, based on his actions in instituting the RICO action and encouraging the limited partners who were later dismissed to participate in that lawsuit. The district court granted summary judgment to Toto and entered various orders relating to fees, costs, and sanctions. McMahan and MBM then appealed, and Toto cross-appealed. [FN1]

> FN1. Although there are two appeals with two different case numbers before us, we have consolidated the appeals for decisional purposes.

In order to dispose of this appeal, an issue we must decide is whether the state court's decision collaterally estops McMahan and MBM from establishing that the dismissed limited partners breached their agreements, which is an essential element of the tortious interference claim. If it does, then a second and third issue are presented. The second issue is whether the district court abused it discretion by not imposing sanctions against MBM and McMahan or their counsel pursuant to Fla. Stat. §57.105 and 28 U.S.C. §1927. The third issue is whether under Florida's offer of judgment statute Toto is entitled to recover the attorney's fees he incurred since the making of an offer to settle the tortious interference claim.

As we will soon explain in full, we decide that collateral estoppel does bar the tortious interference claim, and that the

district court did not abuse its discretion in declining to award sanctions. However, we decide that the district court erred in awarding attorney's fees pursuant to the offer of judgment statute.

I. BACKGROUND
A. FACTS

In September of 1980, MBM [FN2] was formed for the purpose, among other things, of trading government securities and commodities. From 1980 through 1982, between 300 and 400 investors purchased limited partnership interests in MBM, lured by the promise of significant tax benefits. Toto bought in for $200,000 and received one partnership unit in MBM in return.

> FN2. MBM changed its name to McMahan & Company on January 16, 1985, and to Nemesis Veritas, L.P. on July 30, 1996. To avoid confusion we will use the old name throughout this opinion.

However, the promised tax benefits were, like many things in life, too good to be true, and the IRS subsequently disallowed many of the deductions claimed by the limited partners relating to MBM and imposed draconian penalties. The IRS notified Toto in late 1987 of its audit of MBM, and Toto eventually paid approximately ***1124** $630,000 to settle his dispute regarding deductions he claimed relating to his investment in MBM.

Eventually, McMahan offered to buy back the interests of all of the MBM limited partners. As part of the sale of their interest to McMahan, each tendering limited partner executed a contract of sale and security agreement providing for the assignment to

McMahan of all rights to any cause of action the limited partner may have in connection with (1) the original sale of the partnership interest to the limited partner, and (2) the conduct of MBM's business prior to the sale of the limited partner's interest. Each contract also provided that each tendering limited partner released MBM and its general partners from all claims arising from disallowance by the IRS of any tax benefits stemming from MBM. [FN3] Each contract provided that it would be governed by New York law. On December 31, 1984, McMahan bought back the interests of more than 80% of the limited partners of MBM. Toto, however, did not sell his limited partnership interest to McMahan.

> FN3. Paragraph 13 of each contract provides, in relevant part:
> 13. Assignment and Release of Claims. The Seller hereby assigns to the Purchaser all of his right, title and interest in and to any and all causes of action, suits, claims and demands whatsoever against any party which the Seller ever had, now has, or hereafter can, shall or may have, by reason of or in connection with the sale of the Interest by the Partnership to the Seller and (b) [sic] the conduct of the Partnership's business prior to the date of the Seller's tender of his Interest, but excluding claims in connection with the solicitation of Interests pursuant to which this Agreement is being executed.
> The Seller hereby releases the Partnership and the general partners thereof, and, to the fullest extent applicable, their respective heirs, executors, successors, employees, agents and assigns, from all causes of action, suits, claims and demands whatsoever which the Seller ever had, now has, or hereafter can, shall or may

> have, by reason of any damages arising from any and all claims which might arise upon disallowance by the Internal Revenue Service of tax benefits previously taken by the Partnership.

In 1988 or early 1989, Toto contacted the law firm of Biegel & Sandler ("B&S") about filing a lawsuit against MBM and McMahan. Not prepared to fund the litigation himself, however, Toto contacted other MBM limited partners beginning in 1990 regarding his intention to sue and inquiring as to their interest in joining him. In June of 1991 B&S also contacted the limited partners, stating that it required a minimum $25,000 retainer to pursue the action. B&S proposed that each limited partner contribute an amount equal to 1% of his or her investment in MBM towards the retainer, to be credited against a 1/3 contingency fee for B&S.

Eventually, fifteen limited partners retained B&S and filed suit in June of 1992 against MBM and McMahan (and others), alleging civil violations of the Racketeer Influenced and Corrupt Organizations Act and various state law theories of recovery ("the RICO Action"), claiming damages from the loss of their limited partnership investments, the disallowance of tax deductions, and imposition of penalties. The suit was filed in the United States District Court for the District of New Jersey, but that court determined that venue was inappropriate and the case was transferred to the Southern District of New York in July of 1993.

However, some of the limited partners who had joined in the RICO Action had, as part of the sale of their interest back to McMahan, signed a contract whereby they assigned and released certain rights. MBM and McMahan moved for summary judgment against these limited partners, whom we

will call "the Releasors," arguing ***1125** that they were prevented from bringing such an action by the terms of the contracts. On February 7, 1995, the district court granted the motion, rejecting the Releasors' argument that the assignment and releases were invalid because they were induced by fraud, and holding that the asserted claims were within the scope of the assignments and/or releases given by the Releasors. *See Toto v. McMahan, Brafman, Morgan & Co.,* 1995 WL 46691, at *14 (S.D.N.Y.1995).

On January 5, 1996, MBM and McMahan filed a complaint against the Releasors in the Supreme Court of New York which asserted, among other things, a cause of action for breach of contract based on the Releasors' participation in the RICO Action despite the assignment and release provisions contained in the contracts. [FN4] MBM and McMahan sought damages in the amount of $30,000,000 as a result of the breach of their agreements by the Releasors. On May 19, 1998, the Appellate Division of the Supreme Court of New York held that the Releasors were entitled to summary judgment on the breach of contract cause of action, because the assignment and release provisions of the contracts constituted releases, and not covenants not to sue:

> FN4: The complaint alleges, in relevant part: *AS AND FOR A FIRST CAUSE OF ACTION* (Breach of Contract)
>
> ...
>
> 21. Notwithstanding their execution of the Contracts of Sale and Sales Agreement, and the releases contained therein, defendants proceeded to breach their agreements by suing plaintiffs and others in the United

> States District Court, District of New Jersey and the United States District Court, Southern District of New York, for alleged violations of the Racketeer Influenced and Corrupt Organizations Act, fraud, breach of fiduciary duty and negligent misrepresentation in the sale of said limited partnership interests.
>
> ...
>
> 24. By reason of defendants' breach of the aforementioned agreements, plaintiffs have sustained damages in an amount in excess of $30,000,000 for which defendants are jointly and severally liable.

The assignment and release clauses contained in the contracts constitute releases, not implied covenants not to sue, because they relate to claims extant at the time the parties entered into the contracts. A release is a provision that intends a present abandonment of a known right or claim. By contrast, a covenant not to sue also applies to future claims and constitutes an agreement to exercise forbearance from asserting any claim which either exists or which may accrue ... The provisions at issue do not speak to the future, but rather are related to known events that had transpired prior to execution of the contracts, namely the Internal Revenue Service audit and the operation of the MBM partnership. Absent a covenant not to sue, there exists no implicit agreement by defendants to pay the attorneys' fees, as would result from breach of a covenant not to sue. *McMahan & Co. v. Bass,* 250 A.D.2d 460, 673 N.Y.S.2d 19, 21 (N.Y.App.Div.1998). The parties filed a Stipulation of Discontinuance with Prejudice on September 2, 1999, thereby foreclosing any further appeal.

B. PROCEDURAL HISTORY

Not content with merely suing the Releasors, MBM and McMahan filed this lawsuit against Toto on May 6, 1996. Count I of their Second Amended Complaint alleged that Toto committed tortious interference with contractual relations by inducing the Releasors to participate in the RICO Action, even though he knew at the time that they had by the terms of the contracts released MBM and McMahan ***1126** from any and all claims. Count II alleged Toto had engaged in malicious prosecution by prosecuting the RICO Action with full knowledge that it was barred by the assignments and releases contained in the contracts without the consent of one of the Releasors.

On March 29, 1999, the district court granted Toto's motion for summary judgment as to Count II, the malicious prosecution claim, and that part of the case is not at issue in this appeal. But at the same time the court denied Toto's motion for summary judgment on Count I, the tortious interference claim. On May 11, 1999, acting pursuant to Fla. Stat. §45.061 and, in the alternative, Fla. Stat. §768.79, Toto made an offer to settle for $100 the litigation on Count I. His offer read as follows:

Defendant, WILLIAM A. TOTO, hereby offers pursuant to Fla. Stat. §45.061 to settle this case for the amount of $100.00 (One Hundred Dollars) upon a stipulation for dismissal, or, alternatively, pursuant to Fla. Stat. §768.79, at Plaintiff's election, to allow judgment to be taken against him in the total sum of $100.00 (One Hundred Dollars), in full and final resolution of all claims made in this action.

MBM and McMahan did not accept the offer.

On October 29, 1999, the district court again denied Toto's renewed motion for summary judgment as to Count I, the tortious interference claim. But on December 21, 1999, although nothing changed, the district court granted summary judgment to Toto on that claim. The basis of the district court's decision was that the New York state court decision in *Bass* collaterally estopped it from finding that the Releasors had breached their contracts, an essential of the tortious interference claim against Toto.

Thereafter, Toto filed a motion (1) under Fla. Stat. §57.105 for attorney's fees, (2) under 28 U.S.C. §1927 for fees and costs due to the vexatious multiplication of proceedings, and (3) under Fla. Stat. §768.79 for fees and costs. [FN5] The district court denied the motion for fees and costs pursuant to Fla. Stat. §57.105 and 28 U.S.C. §1927, but granted the one for fees and costs pursuant to Fla. Stat. §768.79 and ordered MBM and McMahan to pay Toto a total of $260,034.29. MBM and McMahan have appealed the judgment against them on their Count I tortious interference claim and the order awarding fees and costs against them under Fla. Stat. §768.79, while Toto has cross-appealed the order denying him fees and costs under Fla. Stat. §57.105 and 28 U.S.C. §1927.

> FN5. Toto also filed a motion for costs (other than attorney's fees) under Fed.R.Civ.P. 54(d) and 28 U.S.C. §1920, which was granted in the amount of $4,799.33. MBM and McMahan make no argument that costs were incorrectly taxed against them in that regard, and accordingly no issue concerning that award is before us in the appeal. *Federal Sav. & Loan Ins. Corp. v. Haralson,* 813 F.2d 370, 373n.3 (11th Cir. 1987) ("[I]ssues that clearly are not designated in the

appellant's brief normally are deemed abandoned.").

II. DISCUSSION

We begin our discussion with MBM and McMahan's appeal from the summary judgment against them on the tortious interference claim, because if they are entitled to reversal of it the costs issues will be moot.

A. COLLATERAL ESTOPPEL

The district court granted summary judgment against MBM and McMahan on their tortious interference claim because it concluded that they were collaterally estopped from pursuing that claim by the ***1127** decision against them in *McMahan & Co. v. Bass,* 250 A.D.2d 460, 673 N.Y.S.2d 19, 21 (N.Y.App.Div.1998). In reaching that conclusion the district court followed a chain of reasoning with the following five links. First, Virginia law governs the tortious interference claim in the case. Second, under Virginia law in order to succeed on such a claim a plaintiff must show that the defendant engaged in "intentional interference inducing or causing a breach or termination of the relationship," *Krantz v. Air Line Pilots Ass'n,* 245 Va. 202, 427 S.E.2d 326, 328 (1993), which means that another party must have breached a contract with the plaintiff or terminated a contractual relationship with the plaintiff. Third, Virginia law gives a judgment from another jurisdiction the same preclusive effect it would receive in that jurisdiction. *See Coghill v. Boardwalk Regency Corp.,* 240 Va. 230, 396 S.E.2d 838, 840 (Va.1990); *see generally* 28 U.S.C. §1738 (state court judgments have the same preclusive effect in federal court they have in the state where the judgment was rendered). Fourth,

under the law of New York, where the *Bass* decision was issued, a party is collaterally estopped from relitigating in another proceeding an issue necessarily decided against that party in a prior proceeding. *See Conte v. Justice,* 996 F.2d 1398, 1400-03 (2d Cir.1993). Fifth, in *Bass* the New York appellate court necessarily decided against MBM and McMahan the issue of whether the Releasors had breached a contractual undertaking not to sue MBM and McMahan. It follows from those five premises that because of the *Bass* decision MBM and McMahan are collaterally estopped from asserting that the Releasors breached a contractual obligation not to sue them, and without any breach MBM and McMahan's claim that Toto wrongfully induced a breach must fail.

[1] MBM and McMahan do not deny that the district court's conclusion logically follows if the five premises we have set out for it are correct, nor do they take issue with the first four of those premises. The only one that MBM and McMahan dispute is the fifth premise--they contend that the *Bass* decision did not necessarily decide that there was no breach by the Releasors of a contractual obligation not to sue MBM and McMahan. Like the district court, we disagree.

In *Bass,* the complaint MBM and McMahan filed in New York state court against the Releasors claimed that by participating in the RICO Action in federal court the Releasors had breached agreements in the assignment and release provisions of their contracts with MBM and McMahan resulting in damages in the amount of $30,000,000. The Appellate Division of the Supreme Court of New York held that the agreements the Releasors had signed constituted releases, and not covenants not to sue. *Bass,* 673 N.Y.S.2d at 21. The result of the *Bass* litigation was that MBM and McMahan took nothing on their breach of contract

claim. They lost on it. MBM and McMahan concede that they pleaded a breach of contract claim against the Releasors in *Bass* and that they did not prevail on it, but they maintain that somehow their contract claim was not decided; instead, they insist, in some unexplained way the contract claim was converted to one for attorney's fees only. How that could have happened is not entirely clear, and we conclude that it did not happen. Because the *Bass* court had a statutory duty to "dispose of all issues in the proceeding," N.Y. C.P.L.R 7804(g), and the breach of contract claim was clearly raised in the pleadings, we think that claim actually was decided against MBM and McMahan in *Bass*. *See Grubb v. Public Utilities Comm'n of Ohio,* 281 U.S. 470, 477-78, 50 S.Ct. 374, 377-378, 74 L.Ed. 972 (1930) ("Omitting to mention that question in the opinion did ***1128** not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it."); *Nelson v. Swing-A-Way Mfg. Co.,* 266 F.2d 184, 187 (8th Cir.1959) ("The doctrine of collateral estoppel applies to matters necessarily decided in the former judgment even if there is no specific finding or reference thereto.").

Because we agree with the district court that MBM and McMahan are collaterally estopped from establishing in this lawsuit that the Releasors breached their contractual agreements, Toto is entitled to summary judgment on the tortious interference claim that he wrongfully induced them to do so. Our decision in this respect requires that we decide MBM and McMahan's appeal of the grant of costs and attorney's fees under Fla. Stat. §768.79, and Toto's cross-appeal of the denial of attorney's fees under Fla. Stat. §57.105 and the denial of sanctions under 28 U.S.C. §1927. We start with the cross-appeal issues, which are the easiest ones to decide.

B. 28 U.S.C. §1927

[2][3]We review the trial court's ruling on an award of sanctions under 28 U.S.C. §1927 only for abuse of discretion. *Peterson v. BMI Refractories,* 124 F.3d 1386, 1390 (11th Cir.1997). As we have observed, the abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment we will not reverse even if we would have gone the other way had the choice been ours to make. *See In re Rasbury,* 24 F.3d 159, 168 (11th Cir.1994).

Toto, of course, contends that the district court's decision not to award him sanctions against counsel for MBM and McMahan under 28 U.S.C. §1927 is a clear error of judgment. Section 1927 provides that "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. §1927. The district court refused to award sanctions under section 1927, stating simply that MBM and McMahan have not "unreasonably extended the proceedings." [FN6]

> FN6. The statute speaks of sanctions against counsel, *see* 28 U.S.C. §1927, while the district court spoke of the actions of MBM and McMahan, which we take to be a shorthand reference to their counsel.

The plain language of section 1927 sets forth three requirements to justify an imposition of sanctions:
(1) an attorney must engage in "unreasonable and vexatious"

conduct;
(2) such "unreasonable and vexatious" conduct must "multipl[y] the proceedings;" and
(3) the amount of the sanction cannot exceed the costs occasioned by the objectionable conduct.
Peterson, 124 F.3d at 1396. The critical question in this case involves the first *Peterson* factor--whether the filing of this lawsuit was "unreasonable and vexatious" conduct.

[4][5] On this record, we cannot say that the district court abused its discretion in answering that question in the negative. Counsel for MBM and McMahan argued to the district court that the New York state court decision in *Bass* never decided the issue of whether the Releasors had breached their contracts by joining the RICO action. MBM and McMahan took the position that *Bass* had merely held that they were not entitled to attorney's fees, which did not necessarily mean there had been no breach of contract by the Releasors. ***1129** The district court and this Court have rejected their position since this lawsuit was filed, but that merely means there is no merit to the position. Something more than a lack of merit is required for §1927 sanctions or they would be due in every case. The opinion of the Appellate Division of the Supreme Court of New York in *Bass* is not entirely clear, and actually does offer some support for MBM and McMahan's interpretation of that opinion, although not enough to convince us their interpretation is correct. *See generally Bass,* 673 N.Y.S.2d at 20-21 (stating that "[MBM] and McMahan seek payment of attorneys' fees in connection with the defense of the [RICO Action]"). Not only that, but the district court twice denied summary judgment to Toto on his collateral estoppel theory before finally concluding that MBM and McMahan's reading of the *Bass* decision was wrong.

Given these circumstances, we cannot say that it was a clear error in judgment for the district court not to award §1927 sanctions against counsel for MBM and McMahan. That does not mean we would have reversed the district court had it awarded sanctions. As we explained in *Rasbury,* under an abuse of discretion standard there will be circumstances in which we would affirm the district court whichever way it went. 24 F.3d at 168 ("Quite frankly, we would have affirmed the district court had it reached a different result, and if we were reviewing this matter *de novo,* we may well have decided it differently.").

C. FLA. STAT. §57.105

[6] We turn now to the other part of Toto's cross-appeal, which is his contention that the district court erred in failing to award him attorney's fees against MBM and McMahan under Fla. Stat. §57.105, the frivolous litigation statute. Generally, a district court's decision about whether to award attorney's fees is reviewed for an abuse of discretion, *see Am. Civil Liberties Union of Georgia v. Barnes,* 168 F.3d 423, 427 (11th Cir.1999), and, more specifically, a trial court's decision about whether to award attorney's fees under Fla. Stat. §57.105 is reviewed only for an abuse of discretion. *Dep't of Health v. Curry,* 722 So.2d 874, 879 (Fla. 1st DCA 1998).

[7] Section 57.105, as it read in May of 1996 when MBM and McMahan filed their complaint in this lawsuit, provided, in relevant part:

The court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the

losing party; provided, however, that the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client.

Section 57.105 was amended, effective October 1, 1999, but that amendment is not relevant to this case, because it was adopted more than three years after this lawsuit was filed. Because the complaint in this case was filed in May of 1996, before the October 1, 1999 effective date of the amendment to §57.105, the "old" version of §57.105 would apply, which only allows sanctions where there was a "complete absence of a justiciable issue of either law or fact raised by the complaint." *See Fla. Dep't of Revenue v. Lucignani*, 775 So.2d 996, 997 n.1 (Fla.3d DCA 2000) (holding that 1997 version of §57.105 applies because the DOR's motion for contempt was filed before the effective date of the amendment to that section); *Visoly v. Sec. Pacific Credit Corp.*, 625 So.2d 1276, 1277 (Fla. 3d DCA 1993) (holding that amendment to §57.105 did not apply retroactively ***1130** to a case that was commenced before the October 1, 1990 effective date of the amendment).

[8] The question of whether §57.105 even applies in a case such as this one, where the substantive law of Virginia governs the underlying claims, is one we need not answer. Assuming that §57.105 does apply to this case, the district court's refusal to award attorney's fees under it is not an abuse of discretion. Given the less than pellucid clarity of the opinion in *Bass* and the fact that the district court twice decided not to grant summary judgment to Toto on the collateral estoppel theory of defense before finally doing so, we cannot say that it was a clear error of judgment for the district court to conclude that there was not a "complete absence of a justiciable issue of either law or fact raised by the complaint," which is the

standard under §57.105.

MBM and McMahan filed their complaint in this case charging Toto with malicious prosecution and tortious interference in May of 1996. The New York state court's decision in *Bass,* which held that the Releasors were entitled to summary judgment against MBM and McMahan on their breach of contract cause of action, was not issued until May of 1998. "The point in time to assess whether the granting of fees pursuant to section 57.105 is appropriate is at the lawsuit's inception, or in other words, at the time of the filing of the complaint." *Haas v. Roe,* 696 So.2d 1254, 1256 (Fla.2d DCA 1997). Thus, although the decision in *Bass* has collateral estoppel effect and precludes MBM and McMahan from litigating their tortious interference claim here, it did not have that effect until two years after the complaint in this case was filed. Accordingly, we affirm the district court's holding that there was not a "complete absence of a justiciable issue of either law or fact" at the time the complaint was filed.

D. FLA. STAT. §768.79

[9] We review the district court's determinations of state law in a diversity case *de novo. See Salve Regina College v. Russell,* 499 U.S. 225, 231, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991); *Ins. Co. of N. Am. v. Lexow,* 937 F.2d 569, 571 (11th Cir.1991).

The question before us is whether the Supreme Court of Florida would apply its offer of judgment statute, Fla. Stat. §768.79, to a case where Virginia substantive law governs the underlying

claim. Section 768.79 provides, in relevant part:
(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

...

(2) ...
An offer must:
(a) Be in writing and state that it is being made pursuant to this section.
(b) Name the party making it and the party to whom it is being made.
(c) State with particularity the amount offered to settle a claim for punitive damages, if any.
(d) State its total amount.
The offer shall be construed as including all damages which may be awarded in a final judgment.

***1131 ...**

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:
1. The then apparent merit or lack of merit in the claim.
2. The number and nature of offers made by the parties.
3. The closeness of questions of fact and law at issue.
4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.
5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.
6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.
Fla. Stat. §768.79.

Somewhat complicating matters, Florida Rule of Civil Procedure 1.442 (Proposals for Settlement), adopted by the Florida Supreme Court, also covers the subject of offers of judgment. [FN7] Rule 1.442 is the procedural vehicle which a litigant can use to enforce the right to attorney's fees. The Florida Supreme Court retains final authority to control judicial procedure and, consequently, the provisions of Rule 1.442 supersede any contrary procedures contained in Fla. Stat. §768.79. Fla. R. Civ. P. 1.442(a).

FN7. To complicate matters even further, the Florida legislature enacted another statute governing attorney's fees and costs related to the acceptance or rejection of offers of settlement and judgment, Fla. Stat. §45.061, although it has been repealed for causes of action accruing after October 1, 1990. *See Timmons v. Combs,*

608 So.2d 1, 3 (Fla.1992).

MBM and McMahan argue that under Florida choice-of-law principles, Virginia law determines whether Toto is entitled to recover the attorney's fees he incurred after his offer of judgment, and for that reason the award of attorney's fees to Toto pursuant to Fla. Stat. §768.79 was incorrect. (Virginia has no offer of judgment rule or statute.)

Choice of Law: General Principles

[10] Federal jurisdiction in this case is based on diversity of citizenship, and the forum state is Florida. As a federal court exercising diversity jurisdiction, we engage in a two-step inquiry to determine if Fla. Stat. §768.79 is applicable. *See Boyd Rosene & Assocs., Inc. v. Kansas Mun. Agency,* 174 F.3d 1115,1118 (10th Cir.1999); *Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc.,* 145 F.3d 463, 479 (1st Cir.1998). In the first step, we determine whether the matter at hand is procedural or substantive for *Erie R.R. Co. v. Tompkins* purposes. 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). If the matter is procedural then federal law will apply; but if the matter is substantive, then we will apply the law of the forum state. *See Erie,* 304 U.S. at 78, 58 S.Ct. at 822 (a federal court sitting in diversity applies state substantive law). If we do determine that the matter is substantive, we examine the substantive law of the forum state, which includes its choice-of-law rules, to ascertain the applicable substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941); *Boyd,* ***1132** 174 F.3d at 1118; *Servicios,* 145 F.3d at 479. We note, however, that the two steps are independent of each other, and thus a finding that a matter is substantive or procedural for *Erie* purposes does not

compel the same characterization for choice-of-law purposes. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 726, 108 S.Ct. 2117, 2124, 100 L.Ed.2d 743 (1988); *Boyd,* 174 F.3d at 1118; *Servicios,* 145 F.3d at 479-80.

a. Is Fla. Stat. §768.79 Substantive or Procedural for Diversity Purposes?

[11] It is clear that statutes allowing for recovery of attorney's fees are substantive for *Erie* purposes. *See All Underwriters v. Weisberg,* 222 F.3d 1309, 1311-12 (11th Cir.2000) (holding Florida statute which allowed an insured or named beneficiary under an insurance policy to recover attorney fees upon judgment in insured's favor was substantive for *Erie* purposes); *see also MRO Communications, Inc. v. Am. Tel. & Tel. Co.,* 197 F.3d 1276, 1282 (9th Cir.1999) ("In an action involving state law claims, we apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule.") (citation omitted); *In re King Resources Co.,* 651 F.2d 1349, 1353 (10th Cir.1981) ("Thus in diversity cases generally, and certainly in this circuit, attorney fees are determined by state law and are substantive for diversity purposes."). As the Supreme Court has stated:

[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.

Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 259 N.31, 95 S.Ct. 1612, 1622 n.31, 44 L.Ed.2d 141 (1975) (citation and quotation omitted). Accordingly, we turn to Florida's choice-of-law rules to determine whether Toto was

entitled to attorney's fees in this tortious interference action.

b. Florida Choice-of-Law Principles

[12] Several decisions from Florida's intermediate appellate courts have, albeit without discussion of the choice-of-law issue, held that the availability of attorney's fees should be determined under the state law which also governs the underlying claim. In *Montalvo v. Travelers Indem. Co.*, 643 So.2d 648, 651 (Fla. 5th DCA 1994), Florida's Fifth District Court of Appeal, in remanding a case concerning interpretation of two automobile insurance contracts to the trial court, directed that the amount of attorney's fees be determined pursuant to North Carolina law, which controlled the interpretation of the insurance contracts. *But cf. Weatherby Assocs., Inc. v. Ballack,* 783 So.2d 1138, 1143 (Fla. 4th DCA 2001) (affirming trial court's award of attorney's fees pursuant to §57.105 where former employer's suit became frivolous after filed even though employment contract between parties stated that Connecticut law would apply to any litigation arising out of the employment agreement, and holding that "[t]he choice of law provision in the agreement is irrelevant, because the trial court did not award attorney's fees pursuant to the agreement. Rather, the court awarded attorney's fees pursuant to section 57.105(1) ...").

In *Andrews v. Continental Ins. Co.*, 444 So.2d 479 (Fla. 5th DCA 1984), the court held that even though an automobile accident occurred in Florida, Maine had the most significant relationship with the occurrence, and that required application of Maine law about whether to confirm an arbitration award. In remanding to the trial court, the Fifth District Court of Appeal held that whether attorney's fees were allowed should also be decided under Maine law. *Id.* at 483.

***1133** Finally, in *Hirsch v. Hirsch,* 369 So.2d 407 (Fla. 3d DCA 1979), Florida's Third District Court of Appeal had previously determined in a related proceeding involving the same parties that New York law applied to a controversy regarding the provisions of a separation agreement, because the parties had specified New York law in that agreement. The appellate court reversed the part of the trial court's judgment increasing support provisions to the wife, and remanded for reconsideration of the award of attorney's fees in light of the reversal on the merits. In doing so, the appellate court noted that attorney's fees could be granted to the wife even though she was unsuccessful in securing a modification, because New York law so provided. *Id.* at 409.

[13] In applying Florida's choice-of-law rules, procedural matters are governed by Florida law, even where another forum's substantive law applies. *See Aerovias Nacionales De Columbia, S.A. v. Tellez,* 596 So.2d 1193, 1194-95 (Fla. 3d DCA 1992) (although New York law applied to substantive matters in wrongful death action, Florida procedural law applied). We believe the Supreme Court of Florida would hold that Fla. Stat. §768.79 is not a "local law rule [] prescribing how litigation shall be conducted." Restatement (Second) of Conflict of Laws §122. Instead, it would hold that Fla. Stat. §768.79 modifies the substantive rights of the parties. Accordingly, we believe that the Supreme Court of Florida would not apply Fla. Stat. §768.79 to a case otherwise governed by the substantive law of Virginia.

[14] In this regard, we find the Florida Supreme Court's discussion of the division of responsibility for enacting

substantive and procedural rules informative:
Article V, section 2(a), of the Florida Constitution provides this Court with exclusive authority to adopt rules for practice and procedure in the courts of this State. The Legislature, on the other hand, is entrusted with the task of enacting substantive law... The Legislature, has modified the American rule, in which party pays its own attorney's fees, and has created a substantive right to attorney's fees in section 768.79 on the occurrence of certain specified conditions.
TGI Friday's Inc. v. Dvorak, 663 So.2d 606, 611 (Fla.1995). Thus, the task of enacting procedural rules that apply even where another forum's substantive law governs is confined to the Supreme Court of Florida. *See In re Amendments to Florida Rules of Civil Procedure,* 682 So.2d 105, 105-06 (Fla.1996) (Florida Supreme Court rejected amendments to Fla. R. Civ. P. 1.442 that were at variance with Fla. Stat. §768.79 because of legislative prerogative to enact substantive law); *Timmons v. Combs,* 608 So.2d 1, 2-3 (Fla.1992) ("[I]t is clear that the circumstances under which a party is entitled to costs and attorney's fees is substantive and that our rule [Fla. R. Civ. P. 1.442] can only control procedural matters.") [FN8] But the ***1134** Florida legislature is entrusted with the task of enacting substantive laws, for choice-of-law purposes, which it exercised in enacting Fla. Stat. §768.79.

> FN8. *See also Boyd Rosene & Assocs. Inc. v. Kansas Mun. Gas Agency,* 174 F.3d 1115, 1120 (10th Cir.1999): In the choice-of-law context, most matters are treated as substantive. Only in particular instances should a court consider a matter to be procedural. If a case "has foreign contacts and ... many issues in the case will be decided by reference to the local law of another state," a state should label an issue "procedural" and thus apply

> its own law only when to do so would serve the purpose of efficient judicial administration. Restatement §122 cmt. a. The range of issues relating to efficient judicial administration is narrow and includes such items as "the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs." *Id.; see generally id.* ch.6. These are matters in which it would be especially disruptive or difficult for the forum to apply the local rules of another state, and in which failure to employ another state's law will not undermine interstate comity.
> (footnote omitted).

Our conclusion that Fla. Stat. §768.79 is a substantive law, for choice-of-law purposes, is buttressed by the fact that it is properly viewed as a type of "loser pays" rule or standard, instead of a sanction for frivolous litigation. In *Servicios,* 145 F.3d at 480-81 n.9, the First Circuit explained that "loser pays" rules might be substantive for conflicts purposes:

> Peru's "loser pays" rule, which presumably always provides an award of attorney's fees to the prevailing party in a suit, has a much better claim to being "substantive" [for purposes of Puerto Rico conflict of laws analysis] than a rule awarding attorney's fees only as a sanction for frivolous litigation. After all, a "loser pays" rule could be conceived of as adding an award of attorney's fees to the recovery provided by the underlying cause of action.
> Loser pays attorney's fees are those awarded to a party merely for prevailing in their suit. *Boyd*, 174 F.3d at 1125-26. Bad-faith attorney's fees, by contrast, are those awarded "against a losing party who acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 1126.

Toto notes, as did the district court, that Florida courts have occasionally described §768.79 as a penalty designed to encourage litigants to act reasonably and in good faith in settling lawsuits. *See, e.g., Eagleman v. Eagleman,* 673 So.2d 946, 947 (Fla. 4th DCA 1996); *Goode v. Udhwani,* 648 So.2d 247, 248 (Fla. 4th DCA 1994). That description does not change the fact that §768.79 provides for a mandatory award of attorney's fees where the offer of judgment is rejected, instead of a discretionary award of attorney's fees designed to sanction frivolous litigation. *See TGI Friday's* 663 So.2d at 611 (Fla. Stat. §768.79 provides for award of attorney's fees regardless of reasonableness of offeree's rejection of offer of judgment); *Jordan v. Food Lion, Inc.,* 670 So.2d 138, 140 (Fla. 1st DCA 1996) (Fla. Stat. §768.79 creates mandatory right to attorney's fees when statutory prerequisites are satisfied, i.e., when a party makes an offer for settlement and that party has recovered a judgment at least 25 percent more or less than the offer). Thus, §768.79 is a "loser pays" type of rule or standard. [FN9]

> FN9. We also note that the Florida Supreme Court's discussion in *TGI Friday's,* 663 So.2d at 611, of the legislature's decision in section 768.79 to modify the traditional American rule that each party pays its own fees strongly suggests that section 768.79 constitutes a "loser-pays" attorney's fees statute. *See Boyd* 174 F.3d at 1126:
>
> Loser-pays attorney's fees are normally not within a court's inherent power. Instead, they reflect a conscious policy choice by a legislature to depart from the American rule and codify the English rule.... The authority to award bad-faith attorney's fees, though frequently codified, is usually within a court's inherent powers ...

(citation omitted).

Fla. Stat. §45.061, which is no longer effective, contained language indicating that an award of attorney's fees was discretionary, because it provided that the court "may" award fees if it determined an offer of judgment had been "rejected unreasonably." However, similar language was not included in §768.79, which uses the word "shall." Accordingly, attorney's fees must be awarded once the statutory prerequisites are satisfied, regardless of the reasonableness of the offeree's rejection. *Knealing v. Puleo,* 675 So.2d 593, 595 (Fla.1996) ("the right to an award [of attorney's fees and costs] depends only on ***1135** the amount of the rejected offer and the amount of the later judgment" and "the reasonableness of the plaintiff's rejection is irrelevant to the question of fee entitlement"). As the Florida Supreme Court has noted:

Under this statute, the legislature did not give judges the discretion to determine whether it is reasonable to entitle qualifying plaintiffs to fees. Rather, it determined for itself that it is reasonable to entitle every offeror who makes a good faith offer (later rejected) ... to an award of fees. Under subsection (7)(b), the court's discretion is directed by the statutory text solely to determining the reasonability [sic] of the *amount* of fees awarded.

TGI Friday's, 663 So.2d at 613.

For all of these reasons, we conclude that Florida choice-of-law principles compel the application of Virginia law on attorney's fees. MBM and McMahan allege, and Toto does not disagree, that Virginia law does not allow recovery of attorney's fees in this case.

III. CONCLUSION

For the foregoing reasons, (1) we AFFIRM the district court's grant summary judgment in favor of Toto on the tortious interference claim, (2) we AFFIRM the district court's decision not to award fees and costs under Fla. Stat. §57.105 and 28 U.S.C. §1927, and (3) we REVERSE the district court's decision to award attorney's fees under Fla. Stat. §768.79.

256 F.3d 1120, 14 Fla. L. Weekly Fed. C 944

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 96-8294-CIV-MIDDLEBROOKS

NEMESIS VERITAS, L.P., f/k/a
MCMAHAN & COMPANY and
D. BRUCE MCMAHAN,

Plaintiffs,

vs.

WILLIAM A. TOTO,

Defendant.

ORDER ON FEES AND COSTS

This Cause came before the Court upon Defendant's Verified Motion for Fees and Costs, filed January 20, 2000 (DE#176). This Motion followed the Court's order dated December 21, 1999, granting Defendant summary judgment. The Court has reviewed the file, including the pleadings responsive to and in support of Defendant's motion, and is otherwise fully informed in the premises.

Defendant seeks attorney's fees and costs under the following provisions: Fla. Stat. § 768.79, which allows for fees and costs where there has been a finding of no liability following an offer of settlement; Fla. Stat. § 57.105, which authorizes fees where the court finds claims to be frivolous; 28 U.S.C. § 1927, which requires attorneys who have unreasonably extended proceedings to satisfy the excess fees and costs incurred; Fed. R. Civ. P. 54(d), which provides that

the prevailing party shall recover its costs, other than its attorney's fees, as of course under 28 U.S.C. § 1920.

The Court declines to grant Defendant fees and/or costs under Fla. Stat. § 57.105 and 28 U.S.C. § 1927, finding that Plaintiffs have neither filed frivolous claims nor unreasonably extended the proceedings. Below, the Court takes up the other two bases.

1. Fla. Stat. §768.79

On May 11, 1999, Defendant made an offer of settlement/judgment to Plaintiffs in the amount of $100.00, pursuant to Fla. Stat. § 45.061 and, in the alternative, Fla. Stat. § 768.79. Defendant has since acknowledged that § 45.061 had been repealed prior to the offer, invalidating the offer as premised on that provision. Thus, we need only address Defendant's offer under § 768.79. That provision provides, in pertinent part, that a defendant who makes an offer of judgment that is not accepted in a case where there is a judgment of no liability, the defendant is entitled to recover his reasonable costs and attorney's fees incurred from the date the offer was filed.[1] Fla. Stat. § 768.79(1).

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[1] Fla. Stat. § 768.79 provides, in pertinent part, as follows:

> In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by him or on his behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the

A. What state's law governs attorney's fees issue?

This basis for recovery of fees and costs necessitates a choice of law analysis. In performing this analysis, we are guided by the First Circuit's opinion in *Servicios Comerciales Andinos, S.A. v. General Elec. Caribe, Inc.*, 145 F. 3d 463 (1st Cir. 1998), which was followed by the Tenth Circuit in *Boyd Rosene and Assocs., Inc. v. Kansas Municipal Gas Agency*, 174 F.3d 1115 (10th Cir. 1999). In *Servicios Comerciales*, the First Circuit was in the same position we now find ourselves in: determining what state's law to apply to a claim for attorney's fees while exercising diversity jurisdiction.

A federal court sitting in diversity must engage in a two-step inquiry. *See Servicios Comerciales*, 145 F.3d at 479. First, the court must determine whether a particular matter is procedural or substantive for *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) purposes. *Id.* If the matter is procedural, then federal law applies; if the matter is substantive, then the court follows the law of the forum state. *Id.* Second, if the court has determined that the matter is substantive for *Erie* purposes, then it looks to the substantive law of the forum state, including its choice of law principles, to determine the applicable substantive law. *See Boyd Rosene*,174 F.3d at 1118 (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496

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judgment is of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

Fla. Stat. §768.79(1).

(1941); *see also Trumpet Vine Invs. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1115 (11th Cir. 1996). These steps are distinct: what is substantive or procedural for *Erie* purposes is not necessarily substantive or procedural for choice of law purposes. *Id.* (citing *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (rejecting notion that "there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflict of law")).

i. *Erie*

The Tenth Circuit in *Boyd Rosene* summarily dispensed with the first inquiry, citing precedent for the proposition that attorney's fees are substantive for *Erie* purposes.[2] *See id.* (citing *King Resources Co. v. Phoenix Resources Co.*, 651 F.2d 1349 (10th Cir. 1981)). Language in *Phoenix Resources* suggests that its rule cuts across circuit boundaries and is applicable in diversity cases generally. *See Phoenix Resources*, 651 F.2d at 1353 ("Thus in diversity cases generally, and certainly in this circuit, attorney fees are determined by state law and are substantive for diversity purposes). Moreover, the *Phoenix Resources* court cites *Alyseka Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n. 31 (1975), a case binding on the Eleventh Circuit, as standing for the proposition that attorney fees are

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[2] The First Circuit's holding on this issue was more specific: whereas the Tenth Circuit found that attorney's fees are substantive for diversity purposes, the First Circuit limited its finding to the attorney's fees provision before it, Puerto Rico r. Civ. P. 44.1.

substantive for diversity purposes.[3] *See also Whiteside v. New Castle Mut. Ins. Co.*, 595 F. Supp. 1096, 1100 (D. Del 1984) ("under *Erie* principles, attorney's fees are considered substantive and controlled by state law in diversity cases.").

Eleventh Circuit attorney's fees analyses have been less explicit in distinguishing the *Erie* and choice of law inquiries. In *American Family Life Assurance Co. of Columbus, Georgia v. United States Fire Co.*, 885 F.2d 826 (11th Cir. 1989), the Eleventh Circuit stated that "[i]n diversity cases, the choice-of-law rules of the forum state determine which state's substantive law applies." *Id.* at 830; *see also Union Capital Partners*, 92 F.3d at 1115 ("In determining which law applies, a federal district court sitting in diversity must apply the choice of law rules of the forum state."). Implicit in *American Family*, assuming the Eleventh Circuit follows the two-step process, was a finding that the issue in question - whether the plaintiff was entitled to attorney's fees - was a substantive one, mandating application of the forum state's substantive law concerning choice of law.

In *Tanker Management, Inc. v. Brunson*, 918 F.2d 1524 (11th Cir. 1990), the Eleventh Circuit did, however, examine whether the federal offer of judgment rule - Federal Rule of

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[3] In *Alyeska*, the Supreme Court stated as follows:

> [I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed.

Alyeska, 421 U.S. at 259 n. 31 (quoting 6J. Moore, Federal Practice ¶ 54.77[2], at 1712 - 13 (2d ed. 1974)).

Civil Procedure 68 - preempted the Florida statutory offer of settlement provision - Fla. Stat. § 45.061 - thereby performing the *Erie* analysis in a context similar to the one before this Court.[4] The *Tanker* court, however, did not need to conduct a substance versus procedure analysis. Instead, the court rested its ruling on the principle that *Erie* commands the enforcement of state law where there is no federal rule that covers the issue in dispute. *Tanker,* 918 F.2d at 1528 (quoting *Walker v. Armco Steel Corp.,* 446 U.S. 740, 750 (1980)). Thus, the court held that Rule 68 did not preempt the state law, whether or not the state law was substantive or procedural in nature. The *Tanker* court found that § 45.061 and Rule 68 were not in "direct collision" because "Rule 68 concerns only interest and offers of judgment, while the Florida statute concerns attorney's fees, offers of judgment and settlement offers." *Id. See also MRO Communications, Inc. v. American Tel. & Tel. Co.,* 197 F.3d 1276, 1282 (9th Cir. 1999) ("In an action involving state law claims, we apply the law of the forum state to determine whether a party is entitled to attorneys' fees, unless it conflicts with a valid federal statute or procedural rule.").

Whether § 768.79 "collides" with Rule 68 is a closer call, as both govern offers of judgment. We find that, for purposes of *Erie,* there is no "collision." Whereas Rule 68's

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[4] As the parties indicate, § 45.061 has since been repealed. Nonetheless, the court's *Erie* analysis of §45.061 is instructive. We also note that the *Tanker* court examined the applicability of Fla. Stat. § 768.79, the statutory provision relevant in the matter before the Court, denying its application on grounds not pertinent here: the old version of § 768.79 did not permit courts toaward prevailing defendants attorney's fees, for it only applied to a "judgment obtained by the plaintiff."

application is limited to instances where a judgment is finally obtained by the offeree, § 768.79 applies even where there is a judgment of no liability. *Compare* Fed. R. Civ. P. 68 and Fla. Stat. § 768.79(1). Thus, § 768.79 is broader than Rule 68; it does not conflict with Rule 68. *See Walker,* 446 U.S. at 750 ("'[T]he scope of the Federal Rule [is] not as broad as the losing party urge[s], and therefore, there being no Federal Rule which cover[s] the point in dispute, *Erie* command[s] the enforcement of state law.'"). *Alyeska* offers further support, noting that state laws generally do not conflict with a federal statute or rule of the court. *Alyeska,* 421 U.S. at 259 n. 31.[5]

Based on the foregoing discussion, particularly the Supreme Court's footnote in *Alyeska,* we find that the attorney's fees are substantive for *Erie* purposes and move to step two of the analysis.

ii Florida's choice of law

Is § 768.79 substantive or procedural under Florida's choice of law rules? Although the Florida Supreme court has not addressed this issue directly, we believe that it would apply the choice of law rules of the Restatement (Second) of Conflicts of Laws (1971), as Florida courts have utilized this treatise in other choice of law areas. *See International Ins. Co. v. Johns,* 874 F.2d 1447, 1458 n. 19 (11th cir. 1989). Restatement (Second) of Conflict of Laws § 122 provides that "[a] court usually applies its own local rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." Thus, even though we decided that Virginia law would govern Plaintiffs' claim of tortious interference, *see* March 29, 1999

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[5] *See supra* note 3.

Order at 9 (DE#75), we might apply Florida law to Defendant's offer of judgment if such offers relate to judicial administration.

In *Servicios Comerciales,* the First Circuit characterized the issue before it as "whether, pursuant to section 122 of the Restatement, the courts of the Commonwealth of Puerto Rico would apply Rule 44.1 in a suit otherwise subject to the laws of another state or country." The court concluded that it would, finding that Rule 44.1 is, in the words of § 122, a " local law rule[] prescribing how litigation shall be conducted." *Servicios Comerciales*, 145 F.3d at 480. The purpose of rule 44.1 "is to penalize 'a losing party that because of his stubbornness, obstinancy, rashness, and insistent frivolous attitude has forced the other party to needlessly assume the pains, costs, efforts, and inconveniences of a litigation.'" *Id.* (internal citations omitted). As support for its decision, the court found that Rule 44.1 did not modify the parties' substantive rights, but instead "served the institutional concerns of the courts by allowing the imposition of sanctions upon parties who abuse the judicial process." *Id.*

Implicit in the court's reasoning is its recognition of a distinction between "loser pays" rules and rules awarding attorney's fees as a sanction for frivolous or unnecessary litigation, finding that the former rules are more readily categorized as "substantive." *See id.* at 481 n. 9. "Loser pays" rules, which as a matter of course authorize attorney's fees to the prevailing party, "could be conceived of as adding an award of attorney's fees to the recovery provided by the underlying cause of action." *Id.* In addition, "loser pays" rules "are normally not within a court's inherent power. Instead, they reflect a conscious policy choice by a legislature to depart from the American rule and codify the English rule." *Boyd Rosene,*

174 F.3d at 1126.[6]

Like Rule 44.1, Fla. Stat. § 768.79 is more aptly described as a sanction than as a "loser pays"rule. Its purpose is "to encourage litigants to resolve cases early to avoid incurring substantial amounts of court costs and attorney's fees. It serves as a penalty for parties who fail to act reasonably and in good faith in settling lawsuits." *Eagleman v. Eagleman,* 673 So.2d (Fla. Dist. Ct. App. 1996) (internal citations omitted). *See also Goode v. Udhwani,* 648 So.2d 247, 248 (Fla. Dist. Ct. App. 1994) ("The purpose of section 768.79 was to serve as a penalty if the parties did not act reasonably and in good faith in settling lawsuits. The statutory language even refers to 'the penalties of this section.'").

For further support of its determination that Rule 44.1 was procedural, the *Servicios Comerciales* court turned to the factors listed in the comments to § 122, which bear on whether a provision is substantive or procedural.[7] As in *Servicios*

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[6] It should be noted that in finding the attorney's fees provision before it to be "substantive," the *Boyd Rosene* court relied heavily on its characterization of the provision as a "loser pays" rule. *Boyd Rosene,* 174 F.3d at 1126.

[7] Comment a. to § 122 provides a non-exhaustive list of issues that relate to judicial administration: the proper form of action, service of process, pleading, rules of discovery, mode of trial and execution and costs. As to many issues, it is possible to state categorically whether the local law of the forum will be applied; others, such as Defendant's request for attorney's fees based on his offer of judgment, "fall into a gray area between issues relating primarily to judicial administration and those concerned primarily with the rights and liabilities of the parties." § 122 cmt. A. For those issues falling into the gray

Comerciales, there is no indication that the parties to the dispute before this Court intended to exclude the applicability of Fla. Stat. § 768.79, or to make applicable the litigation rules of Virginia, or another forum. *See id.* Nor is resolution of the attorney's fees issue "likely to affect the ultimate result of the case." *Id.* (quoting § 122 cmt. A.). Though charging Defendant's fees to Plaintiffs under § 768.79 does entail the payment of a monetary penalty, the penalty "is not a remedy arising out of the cause of action." *Id.* Third, as the *Servicios Comerciales* court noted, attorney's fees provisions have not been consistently labeled either "procedural" or "substantive" for choice of law purposes. *Id.* The fourth factor, unlike the preceding three, does not as clearly support finding § 768.79 to be procedural, for applying Virginia's rule of judicial administration, as opposed to Florida's, would not impose an undue burden on the Court. *See* § 122 cmt. A.

For the foregoing reasons, we find § 768.79 to be a procedural rule and thus apply it in determining whether Defendant was entitled to attorney's fees.

B. Application of § 768.79

Plaintiffs argue that even were § 768.79 to apply in this

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area, the following factors are instructive: (1) Whether the issue is one to which the parties are likely to have given thought in the course of entering into the transaction; (2) whether the issue is one whose resolution would be likely to affect the ultimate result of the case; (3) whether the precedents have tended consistently to classify the issue as "procedural" or "substantive" for choice of law purposes; (4) whether an effort to apply the rules of judicial administration of another state would impose an undue burden upon the forum. *Id.*

case, Defendant's offer was procedurally invalid, for Defendant failed to include elements prescribed by law. Specifically, Plaintiffs allege that the offer fails to identify the offerees with the requisite particularity; does not terminate the litigation, rendering it a nullity; fails to state whether it includes claims for costs, including attorney's fees; is based on a repealed statute; and fails to state with particularity the amount, if any, for punitive damages. In addition, Plaintiffs maintain that even were the Court to deem the offer procedurally valid, the Court should find that the offer was not made in "good faith" and therefore exercise discretion to disallow recovery of fees and costs under § 768.79. *See* Fla. Stat. §768.79(7)(a).

i Procedural deficiencies

Plaintiffs' two strongest arguments that Defendant's offer was procedurally deficient under § 768.79 and Florida Rule of Civil Procedure 1.442, which govern settlement offers authorized under Florida law, are as follows: First, Plaintiffs argue that the offer failed to clearly identify the party or parties to which the offer was directed. Second, assuming the offer was, as Defendant maintains, made to both Plaintiffs, the offer failed to apportion the offer between the Plaintiffs.

Based on the language of the offer alone, it is not clear that Defendant intended his offer to apply to both Plaintiffs. Indeed, the plain language suggests that the offer applied only to one of the Plaintiffs, as it refers to "*Plaintiff's* election." (emphasis added). *See* Def.'s "Offer of Settlement and/or Judgment, Exh. A to Def.'s Mot.[8] Were the offer extended to

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[8] The offer states as follows:

> Defendant, WILLIAM A TOTO, hereby offers pursuant to Fla. Stat. §45.061 to settle this case

only one of the Plaintiffs, it would be invalid, for its acceptance would not have brought an end to the litigation, for a Plaintiff would remain. *See Di Paola v. Beach Terrace Assoc., Inc.*, 718 So.2d 1275, 1277 (Fla. Dist. Ct. App. 1998) (finding invalid offer whose acceptance would not have terminated litigation, for one of the purposes of § 768.79 is early termination of litigation). Moreover, even assuming the offer was directed at both Plaintiffs, Plaintiffs argue the offer was still invalid because it failed to clearly specify the offerees in derogation of the procedural requirements. *See* Fla. Stat. § 768.79(2)(b) ("An offer must [n]ame the party making it and the party to whom it is being made."); Fla. R. Civ. P. 1.442(c)(A) (same).

Next, Plaintiffs argue, again assuming the offer was made to both Plaintiffs, that the offer failed to apportion the amount offered between the Plaintiffs in derogation of the procedural requirements. *See* Fla. R. Civ. P. 1.442(c)(3) ("A joint proposal shall state the amount and terms attributable to each party."); *see also McFarland & Son, Inc. v. Basel,* 727 So.2d 266, 270 (Fla. Dist. Ct. App. 1999) (holding that a general offer of judgment made to a group of defendants without assigning each defendant a specific amount lacks the particularity required by rule 1.442); *Di Paola* 718 So.2d at 1277 (same); *Twiddy v. Guttenplan,* 678 So.2d 488, 489 (Fla.

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for the amount of $100.00 (One Hundred Dollars) upon a stipulation for dismissal, or, alternatively, pursuant to Fla. Stat. §768.79, at Plaintiff's election, to allow judgment to be taken against him in the total sum of $100.00 (One Hundred Dollars), in full and final resolution of all claims made in this action.

Dist. Ct. App. 1996) (same).[9]

Despite the principle that "[s]tatutes authorizing awards of attorney's fees are in derogation of common law, and must be strictly construed," *McMullen Oil Co., Inc. v. ISS Int'l Serv. Sys., Inc.*, 698 So.2d 372, 373 (Fla. Dist. Ct. App. 1997), we find that to invalidate Defendant's offer on the technical grounds asserted by Plaintiffs would be to put form before substance.

We reject Plaintiffs' argument premised on their contention that the offer was made to only one of the Plaintiffs. To hold otherwise would be to invalidate Defendant's offer on the grounds that he misplaced an apostrophe. We credit Defendant's claim that his reference to "Plaintiff's" rather than "Plaintiffs'" was a mere typographical error. *See* Def.'s Reply at 12. Indeed, the offer would not have made sense unless it was being offered to both Plaintiffs, for the offer states that its acceptance would constitute "full and final resolution of all claims made in this action." A settlement between Defendant and one of the two Plaintiffs clearly would not have resolved all the claims in this action. Moreover, after three years of litigation, Plaintiffs were not likely misled by Defendant's typo.

We reject Plaintiffs' argument as to apportionment based on the circumstances surrounding the offer: the fact that Plaintiffs alleged their claims jointly in the same complaint and the nominal nature of Defendants's offer. In adopting our position, we are persuaded by language in two unpublished

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[9] Defendant's reliance on *Bodek v. Gulliver Academy*, 702 So.2d 1331, 1332 (Fla. Dist. Ct. App. 1997) for the proposition that an offeror need not apportion an offer between offerees is misplaced. The version of Rule 1.442 applicable in *Gulliver Academy* has since been amended and now requires apportionment. *See id.* at 1332 n. 1.

opinions invalidating offers not apportioned in amount between multiple offerees.

In *United Servs. Auto. Assoc, v. Behar,* 2000 WL 44108 (Fla. Dist. Ct. App. January 21, 2000), the court examined an offer made by a defendant under § 768.79 to a husband and wife that did not apportion the amount offered between the couple. The defendant had offered $125, 001.00 to settle Dr. Behar's claim for damages resulting from a car accident and Mrs. Behar's claim for loss of consortium. *Id.* at *1. Citing Rule 1.442(c)(3), which sets forth an offeror's responsibility to apportion his offer, the court found the defendant's offer to be defective. *Id.* In reaching its conclusion, the court recited the goal of § 768.79, which is to encourage the resolution of litigation. *Id.* Rule 1.442(c)(3) was designed to further that goal, the court explained, by permitting each offeree the opportunity for independent consideration of that offeree's claims. *Id.* at *2. The court noted that though Mrs. Behar's claim was derivative of her husband's it was a separate cause of action. *Id.* Accordingly, the court reasoned, Mrs. Behar should not be denied an independent right to evaluate the offer and decide the manner in which to pursue her own claim just because it was joined with her husband's claim. *Id. See also C&S Chems., Inc. v. McDougald,* 2000 WL 313310, *2 (Fla. Dist. Ct. App. March 29, 2000) (invalidating non-apportioned offer to defendants who "were not joint tortfeasors [and thus] each had the right to evaluate [the offer] independently based on their individual liability situations.").

The case before this Court can be distinguished by reference to the purpose for which Rule 1.442(c)(3) was enacted. Unlike the plaintiffs in *Behar*, Mr. McMahan and Nemesis Veritas do not assert distinct claims. Rather, they asserted identical claims, premised on the same facts and circumstances. The need to protect their rights to independent

consideration of Defendant's offer was not as great as it was in *Behar* or *McDougald*.

Moreover, while requiring Defendant to apportion his nominal offer would be to follow the letter of the law, it would not be true to the law's spirit. Splitting $100 between the parties would not further an offeree's evaluation of the merits of the offer. By its very nature, a nominal offer is without merit to the offeree. It says, "I think that your claim is without foundation, but I make this nominal offer of money to save myself any further aggravation or expense."

Having found Defendant's offer to be procedurally sound, we examine whether it was made in "good faith."

ii Was the offer made in "good faith"?

In § 768.79 "the legislature has created a mandatory right to attorneys fees, if the statutory prerequisites have been met." *Eagleman,* 673 So.2d at 947 (quoting *Schmidt v. Fortner,* 629 So.2d 1036, 1040 (Fla. Dist. Ct. App. 1993)). "Once the statutory prerequisites have been met, the only discretion afforded the trial court by section (7)(a)[10] is the authority to disallow the attorney fee award when an offer is not made in 'good faith.'" *Id.*

Plaintiffs argue essentially that Defendant's $100 offer could not have been in good faith given the millions of dollars Plaintiffs were seeking, the amount of time, money, and effort

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[10] Fla. Stat. § 768.79(7)(a) states that "[i]f a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." *See also* Fla. R. Civ. P. 1.442(h)(1).

Plaintiffs' counsel had already invested in the matter, and the fact that the Court had denied Defendant's first motion for summary judgment. Rather, Plaintiffs maintain that Defendant's offer was nothing more than a "carefully crafted, cleverly calculated, and disingenuous attempt to shift the economic burden of litigation." *Stouffer Hotel Co. v. Teachers Ins.*, 944 F. Supp. 874, 875 (M.D. Fla. 1995), *aff'd* 101 F.3d 707 (11th Cir. 1996).

In an opinion issued subsequent to the cases relied upon by Plaintiffs, the District Court of Appeal of Florida, Fourth District, affirmed an offer of judgment in the amount of $100 and wrote specifically to address "nominal" offers of settlement under § 768.79. *Fox v. McCaw Cellular Communications of Florida, Inc.*, 745 So.2d 330, 331 - 32 (Fla. Dist. Ct. App. 1998). In *Fox*, the plaintiff sued several defendants alleging that they had conspired to prevent him from getting a job with any AT&T dealer. *Id.* at 332. The plaintiff argued that *Eagleman v. Eagleman*, 673 So.2d 946 (Fla. Dist. Ct. App. 1996), a case cited by Plaintiffs, held that all nominal offers are *prima facie* in bad faith. *Id.* Disagreeing, the court declared that *Eagleman* merely held that nominal offers are suspect absent an assessment by the offeror of liability and damages. *Id.* The court noted that "[t]he common thread running through the decisions [recognizing that nominal offers are not *prima facie* in bad faith] is that the offerors in all of them had a reasonable basis at the time of the offer to conclude that their exposure was nominal." *Id.* at 333.

Plaintiffs point out that by May 11, 1999, the date of Defendant's offer, Plaintiffs had incurred many thousands of dollars in legal fees and prevailed on Defendant's first motion for summary judgment. Pltfs' Resp. at 14. These points are directed more to an assessment by Defendant of Plaintiffs' exposure and the reasonableness of Plaintiffs' decision not to

respond to the offer than to Defendant's reasonableness in concluding, at that time, that his exposure was nominal. *See, e.g., Knealing v. Puleo,* 675 So.2d 593 (Fla. 1996) (noting that under § 768.79 the reasonableness of the plaintiff's rejection is irrelevant to the question of fee entitlement). Defendant replies that by May 11, 1999, the appellate court of New York had, as this Court eventually agreed, held that the Releasors had not breached their contracts. Accordingly, Defendant was reasonable in concluding that Plaintiffs could not make out their remaining claim of tortious interference, breach of contract being an essential element of that claim. Therefore, we find that Defendant's offer was made in "good faith."

C. Assessment of Defendant's reasonable costs and attorney's fees

Having found Defendant's offer procedurally valid and made in "good faith." we assess Defendant's reasonable costs and attorney's fees from the date of the filing of the offer. *See* Fla. Stat. §768.79(1). In determining reasonable attorney fees, the Supreme Court of Florida has adopted the federal lodestar approach. *See Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145, 1150 (Fla. 1985). The first step in the lodestar process requires the presiding court to determine the number of hours reasonably expended on the litigation. *Id.* To enable the court to assess the reasonableness of the attorney fee applicant's request, the applicant should present records detailing the amount of work performed. *Id.* Inadequate documentation may result in a reduction in the number of hours credited. *Id.*

Upon review of Defendant's motion for fees and costs and the documents attached thereto, it appears that Defendant's counsel did not submit billing records for review. Accordingly, Defendant is instructed to submit billing records in support of

his claim for attorneys' fees by **April 14, 2000**.

2. Rule 54(d)

Unlike attorney's fees, which are substantive and thus, under *Erie,* governed by state law, costs are procedural and governed by Federal Rule of Civil of Procedure 54(d). *See Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1348 n. 13 (1st. Cir. 1988); *see also Com/Tech Communication Techs., Inc. v. Wireless Data Sys., Inc.*, 163 F.3d 149, 150 (2d Cir. 1998); *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 14 F.3d 373, 392 (8th Cir. 1993).[11] Rule 54(d) provides that "costs shall be

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[11] Professors Wright, Miller, and Kane explain this principle this way:

> The award of costs is governed by federal law. There has been some suggestion that in diversity cases federal courts should look to state law as to costs, in deference to the doctrine of Erie Railroad Company v. Tompkins. With regard to ordinary items of costs, particularly those mentioned in Section 1920 of Title 28, the suggestion clearly is unsound. Variations between state and federal practice in the assessment of costs after the case has been disposed of do not appear likely to promote forum shopping or to affect 'the outcome of litigation' in any significant way and therefore employing federal law does not violate the underlying policies of the Erie principle....
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> 10 C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure § 2669 (1983) (footnotes omitted).

allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). Pursuant to 28 U.S.C. § 1920 we tax costs in the amount of **$4,799.33**.

3. Conclusion

In light of the foregoing, it is hereby ORDERED AND ADJUDGED that Defendant's Verified Motion for Fees and Costs (DE#176) is **GRANTED**. The Court tax costs of **$4,799.33**. An award of attorneys' fees will be made upon review of Defendant's counsels' billing records, to be filed with the Court no later **April 14, 2000**.

It is further ORDERED AND ADJUDGED that Defendant's Request for Hearing (DE#177) and Plaintiffs' Emergency Motions for Protective Orders (DE#s 199 & 200) are **DENIED AS MOOT**. Plaintiffs' Emergency Motion to Strike the Affidavit of Kevin J. Murray, Esq., and to Disqualify the Mediator's Law Firm From Representing Defendant Against Plaintiffs (DE#203-1 & 203-2) are **DENIED**. Plaintiffs' Motion to Consolidate This Motion with Defendant's Motion for Attorney's Fees is **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 5th day of April 5, 2000.

S/—

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies furnished to counsel of record

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802 So.2d 366
26 Fla. L. Weekly D2593
(Cite as: 802 So.2d 366)

District Court of Appeal of Florida,
Fourth District

BDO SEIDMAN, LLP, f/k/a BDO Seidman, a partnership,
Appellant,

v.

BRITISH CAR AUCTIONS, INC., a corporation, and ADT Automotive, Inc., a corporation, Appellees.

No. 4D00-4297.

Oct. 31, 2001.
Rehearing Denied Dec. 26, 2001.

Former client brought action in Florida against Tennessee accounting firm, alleging professional malpractice. The Circuit Court, Broward County, Charles M. Greene, J., entered verdict in favor of former client and awarded former client attorney fees, and accounting firm appealed. The District Court of Appeal held that malpractice suit was barred by the Tennessee statute of limitations. The Circuit Court entered judgment in favor of accounting firm and denied accounting firm's motion for fees, and accounting firm appealed. The District Court of Appeal, Klein J., held that: (1) accounting firm was not estopped from changing its position regarding whether

Tennessee or Florida law applied to its motion for fees, and (2) Florida statute authorizing award of attorney fees applied.

Reversed and remanded.

Gross, J., filed a specially concurring opinion.

Polen, C.J., filed a dissenting opinion.

West Headnotes

[1] Estoppel k68(2)
156k68(2)

Accounting firm was not estopped from changing its position regarding whether Tennessee or Florida law applied to its motion seeking attorney fees from former client; neither side was prejudiced by the change, as both parties had an equal opportunity and similar difficulty in attempting to find the answer to the question of first impression, and the change in position involved only a question of law. (Per opinion of Klein, J., with one Judge concurring specially.) West's F.S.A. § 768.79.

[2] Accountants k10.1
11 Ak10.1

Florida statute authorizing the award of attorney fees to accounting firm applied in action by former client, although accounting firm was a Tennessee resident and the trial court applied Tennessee law to the cause of action; statute applied to all civil actions for damages brought in Florida, regardless what state's substantive law applied. (Per opinion of Klein, J., with

one Judge concurring specially.) West's F.S.A. §768.79.

[3] Constitutional Law k70.3(3)
92k70.3(3)

Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review; the courts have no veto power, and do not assume to regulate state policy, but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law. (Per opinion of Klein, J., with one Judge concurring specially.)
***367** Daniel S. Pearson, and Lenore C. Smith of Holland & Knight, LLP, Miami, for appellant.

Timothy J. McDermott, and J. Riley Williams of Akerman, Senterfitt & Eidson, P.A., Jacksonville, and Paul R. Regensdorf of Akerman,, Senterfitt & Eidson, P.A. Fort Lauderdale, for appellee British Car Auctions, Inc., a corporation.

KLEIN, J.

The issue in this case whether Florida's offer of judgment statute can be utilized in a case arising in Tennessee but litigated in Florida under Tennessee substantive law. We conclude that this should not be resolved under conflict of laws principles, and that the statute applies in this case.

British Care Auctions received tax advice in Tennessee from DBO Seidman, LLP, an accounting firm, and sued Seidman for professional malpractice in Florida. Prior to trial, each party made an offer of judgment pursuant to section 768.79, Florida

Statutes (1991), but neither offer was accepted. A jury found Seidman to have been negligent and awarded damages of $3,200.662. British Car was awarded attorney's fees under section 768.79, and Seidman appealed both the damages and fees.

Applying Tennessee law, which the parties agreed governed, we held that the malpractice suit was barred by the Tennessee statute of limitations. *BDO Seidman, LLP v. British Car Auctions, Inc.*, 745 So.2d 1082 (Fla. 4th DCA 1999). [FN1] We reversed for entry of judgment in favor of Seidman without reaching the issue of attorney's fees, which had become moot.

FN1. Florida's borrowing statute, section 95.10 Statutes (1999), provides that a cause of action will be barred in this state if it is barred in the state where it arose "because of lapse of time."

Following the mandate, the trial court entered judgment in favor of defendant Seidman, and Seidman moved for attorney's fees under its section 768.79 offer of ***368** judgment. Acknowledging that it had taken a different position on the prior appeal, Seidman said that it had been mistaken when it argued that Tennessee law controlled the issue of attorney's fees. Ruling that Tennessee law "preempts" Florida law of the issue of fees, the trial court denied Seidman's motion, and Seidman appeals.

[1] We first address British Car's argument that Seidman was estopped from changing its position and seeking fees under section 768.79. Both parties made offers of judgment pursuant to the statute and, at different times in the litigation, each party changed its position on the applicability of it. Neither side has

been prejudiced by the other's change of position, which involved only a question of law. Both parties had equal opportunity, and similar difficulty, in attempting to find the answer to what was a question of first impression. There was accordingly no estoppel. *See Metropolitan Dade County v. Jones Boatyard, Inc.* 611 So.2d 512, 514 (Fla. 1993); *Chase & Co. v. Little,* 116 Fla. 667, 156 So. 609, 611 (Fla. 1934); *Palm Beach County v. Palm Beach Estates,* 110 Fla. 77, 148 So. 544, 548 (Fla. 1933); *Rafkind v. Simon,* 402 So.2d 22, 24 (Fla. 3d DCA 1981).

[2] Proceeding to the merits, Seidman and British Car both rely on a conflict of laws analysis. Seidman's reasoning reaches the result that section 768.79 is procedural and therefore applies. British Car's argument is that the statute is substantive and should not be applied to this out-of-state cause of action.

Section 768.79(1), Florida Statutes (1991), applies to "*any* civil action for damages filed in the courts of this state." (emphasis supplied.) This statute is clear, and on its face is applicable to this action for damages. It is also constitutional. *See TGI Friday's Inc. v. Dvorak,* 663 So.2d 606, 611 (Fla. 1995). We conclude that, because the statute is clear, it should be applied without engaging in a conflict of laws analysis.

[3] As the Florida Supreme Court explained in *City of Jacksonville v. Bowden,* 67 Fla. 181, 64 So. 769, 772 (1914):

> Where a statute does not violate the federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy, but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to

> enforce statutes only when to do so would violate organic law.

Choice of law considerations, where laws of different states or nations are involved, involve public policy decisions. Restatement (second) of Conflict of Laws § 6 (1971). In *Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 100 Fla. 748, 130 So. 7, 8 (1930), the Florida Supreme Court explained:

> The extent and scope to which the rule of comity will operate is not universal, but will be determined by each sovereignty under the controlling facts of the particular case. It does not require a court to enforce rights given by the statutes of another state to the prejudice of its own citizens, or when complete justice cannot be done, nor will the courts of one state enforce laws of another state which are repugnant to its own or to public policy.

When the Legislature enacted section 768.79, it was making a policy determination that attorney's fees should be recoverable under certain circumstances. *The Florida Bar Re Amendment to Rules of Civil Procedure,* 550 So.2d 442 (Fla. 1989). Implicit in that policy determination was ***369** the decision that the statute would apply to "any" civil action for damages.

If we were to engage in a conflict of laws analysis, which would involve applying other policies., it would, if we held the statute not applicable, violate the principle that a policy decision of a court "must yield to a valid, contrary legislative pronouncement." *VanBibber, v. Hartford Acc. & Indem. Ins., Co.,* 439 So.2d 880, 883 (Fla. 1983). *See also Brown v. Case,* 80 Fla. 703, 86 So. 684 (1920)(in the absence of a statute to the contrary, conflict of law principles, based on public policy will

be applied to determine whether the laws of the forum state or the laws of the state where the cause of action accrued will be applied).

No Florida court, so far as our research indicates, has applied a conflicts of law analysis in order to determine whether a statute, which is clear and constitutional, should be applied. In *Weatherby Associates, Inc. v. Ballack,* 783, So.2d 1138, 1143 (Fla. 4th DCA 2001), the issue was whether a court could assess attorney's fees for bringing a frivolous lawsuit, under section 57.105(1), Florida Statutes (1999), in a case in which Connecticut substantive law applied. Without engaging in a conflict of law analysis, we concluded that the statute applied because the plaintiff "filed and pursued a baseless lawsuit in a Florida court."

Our view that conflict principles should not be applied where the statute is clear is supported by the Restatement (Second) of Conflict of Laws § 6, cmt. b. (1971), in which it is stated:

> The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid. On the other hand, if the legislature intended that the statute should be applied only to acts taking place within the state, the statute should not be given a wider range of application....Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature *even when the local law of*

> *another state would be applicable under usual choice-of-law principles.* [emphasis supplied.]

Section 6 of the Restatement (Second) was relied on by the Florida Supreme Court in *Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999, 1001 (Fla. 1980).

Our conclusion that section 768.79 applies to all civil actions for damages brought in Florida courts is consistent with legislative intent, which is to reduce litigation. *Aspen v. Bayless,* 564 So.2d 1081, 1083 (Fla. 1990). An action for damages based on the substantive law of another jurisdiction has the same impact on the Florida court system as one based on the substantive law of Florida.

We acknowledge that the eleventh circuit has recently held that section 768.79 is substantive under Florida conflict of laws principles. ***McMahan v. Toto*, 256 F.3d 1120 (11th Cir.** 2001). This decision is persuasive, but not binding on us. *State v. Dwyer,* 332 So.2d 333 (Fla. 1976). We respectfully disagree with it. *See* Judge Gross' concurring opinion.

We therefore reverse and remand for the trial court to award attorney's fees to Seidman under its section 768.79 offer of judgment.

GROSS J., concurs specially with opinion.

POLEN, C.J., dissents with opinion.

***370** GROSS, J., concurring specially.

I concur with Judge Klein's opinion. I write separately to note

that even under a choice of law analysis, Seidman is entitled to recover fees under section 768.79 Florida Statutes (1991). [FN2] This is so because the offer of judgment statute is "procedural" under Florida choice of law terminology; it is part of the machinery of Florida's judicial process that promotes judicial economy.

> FN2. Because the underlying cause of action in this case accrued in 1992, the 1991 offer of judgment statute applies. *See Twiddy v. Rocca,* 677 So.2d 387, 388 (Fla. 2d DCA 1996).

British Car's main argument is straightforward. "Tennessee law governs substantive matters in this dispute; Florida law controls procedural issues only." Tennessee law does not allow a prevailing party to recover attorney's fees; the Florida supreme court has described the right to attorney's fees under section 768.79 as "substantive." *See Knealing v. Puleo,* 675 So.2d 593, 596 (Fla. 1996) (stating that section 768.79 contains "substantive provisions authorizing an award of attorney [sic] fees"); *TGI Friday's Inc. v. Dvorak,* 663 So.2d 606, 611 (Fla. 1995) ("The legislature has modified the American rule, in which each party pays its own attorney's fees, and has created a substantive right to attorney's fees in section 768.79."). Seidman agrees that "Tennessee law unquestionably governs the substantive issues because of Tennessee's significant relationship to the dispute," but asserts that the issue of its entitlement to fees is a "separate, procedural issue ... governed by Florida law."

The difficulty in this case arises because two bodies of law--Florida constitutional law and choice of law--use the same "substantive/procedural" terminology.

In the cases cited by British Car, the supreme court was considering the division of power between that court and the legislature under Article V, section 2(a), of the Florida Constitution. Section 2(a) provides that the "supreme court shall adopt rules for the practice and procedure in all courts." *Id.* That provision endows the supreme court "with exclusive authority to adopt rules for practice and procedure in the courts of this State." *Dvorak,* 663 So.2d at 611.

In cases, like *Knealing, Dvorak, Timmons v. Combs*, 608 So.2d 1 (Fla. 1992), and *Leapai v. Milton,* 595 So.2d 12 (Fla. 1992), the supreme addressed constitutional challenges to offer of judgment statutes [FN3] under Article V, section 2(a). The court's characterization of the statutory right to attorney's fees as "substantive" in those cases was an acknowledgment of the legislature's constitutional power to enact the statute, not a determination that the statute was "substantive" for all legal purposes. The values informing choice of law principles are different than those underlying an Article V separation of powers issue. Therefore, what is substantive or procedural for Article V purposes is not necessarily substantive or procedural for choice of law purposes. *See Sun Oil Co. v. Wortman,* 486 U.S. 717, 726, 108 S. Ct. 2117, 100 L.Ed 743 (1988) (rejecting the concept that "there is an equivalence between what is substantive under the *Erie [Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)] doctrine and what is substantive for purposes of conflict of laws").

> FN3 *Leapai v. Milton,* 595 So.2d 12 (Fla. 1992), ruled on the constitutionality of section 45.061, Florida Statutes (1987).

As one commentator has observed:

> The tendency to assume that a word which appears in two or more legal *371 rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs through all legal discussions. It has the tenacity of original sin and must be constantly guarded against.

COOK, THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS, § 159 (1942) (quoted in EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 3.3 n. 3(2d ed. 1992)). The Restatement (Second) of Conflict of Laws has abandoned "procedural" and "substantive" labels, observing that the characterizations "while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as 'procedural' or 'substantive,' regardless of what purposes were involved in the earlier classifications." *Id.* at § 122, cmt. b. Instead of classifying issues as procedural or substantive, the rules of the Restatement "face directly the question of whether the forum's rule should be applied." *Id.*

In a choice of law context, Florida maintains the traditional distinction between substantive and procedural matters. *See Prestige Rent-A-Car, Inc. v. Advantage Car Rental & Sales, Inc.*, 656 So.2d 541, 544 n. 2 (Fla. 5th DCA 1995); *Aerovias Nacionales De Colombia, S.A. v. Tellez*, 596 So.2d 1193, 1195 (Fla. 3d DCA 1992); *Guirlinger v. Goldome Realty Credit Corp.*, 593 So.2d 1135, 1136 n. 1 (Fla. 1st DCA 1992). As the forum state in this case, Florida law determines whether section 768.79 is substantive or procedural for choice of law purposes. *See Fahs v. Martins*, 224 F.2d 387, 397, 401 n.6 (5th Cir. 1955); *Smithco Eng'g, Inc. v. Int'l Fabricators, Inc.* 775 P.2d 1011, 1017-18 (Wyo. 1989). Usually,

> A court will apply foreign law only to the extent that it deals with the substance of the case, i.e., affects the outcome of the litigation, but will rely on forum law to deal with the "procedural" aspects of the litigation.

SCOLES & HAY, CONFLICT OF LAWS § 3.8(2d ed. 1992) (footnotes omitted); *See Colhoun v. Greyhound Lines, Inc.*, 265 So.2d 18, 20 (Fla. 1972). Substantive law generally "relates to the cause of action's rights and duties, whereas procedural law involves 'the machinery for carrying on the suit.'" *Smithco Eng'g,* 775 P.2d at 1018 (quoting *Roth v. Roth,* 571 S.W.2d 659, 672 (Mo.App. 1978) (quoting *Shepherd v. Consumers Co-op. Ass'n,* 384 S.W.2d 635 (Mo.1964))).

To decide whether section 768.79 is substantive or procedural for choice of law purposes, it is helpful to consider those factors the Restatement identifies as pertinent to classifying an issue for choice of law purposes. Florida courts have often relied upon the Restatement to decide conflict of law matters. *See, e.g. Bihsop v. Fla. Specialty Paint Co.,* 389 So.2d 999, 1001 (Fla. 1980); *Aetna Cas. and Sur. Co. v. Huntington Nat'l Bank,* 587 So.2d 483, 485-86 (Fla. 4th DCA 1991). Section 122 provides:

> A court usually applied its own local rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.

Restatement (Second) of Conflict of Laws § 122. "The forum is more concerned with how its judicial machinery functions and how its court processes are administered than is any other state." *Id.* at cmt. a.

Florida cases have identified the legislative objectives behind section 768.79. All pertain to how Florida's "judicial machinery functions."

The purpose of section 768.79 is to lead "litigants to settle by penalizing those who decline offers that satisfy the statutory requirements." *MGR Equip. Corp.,* ***372** *v. Wilson Ice Enters, Inc.,*731 So.2d 1262, 1264 (Fla. 1999); *See Aspen v. Bayless,* 564 So.2d 1081, 1083 (Fla. 1990) (stating that "purpose and intent" of section 768.79 is "to encourage parties to settle claims without going to trial"). Encouraging settlement lowers litigation costs for the parties and reduces the fiscal impact of litigation on the court system. *See Allstate Ins. Co. v. Materiale,* 787 So.2d 173, 176 (Fla. 2d DCA 2001) (Casanueva J., concurring) (indicating that "[t]he purpose of section 768.79" is "to encourage resolution of disputed claims without the unnecessary consumption of scarce judicial resources"); *Pirelli Armstrong Tire Corp. v. Jensen,* 752 So.2d 1275, 1277-78 (Fla.2d DCA 2000) (Casanueva, J., concurring in part, dissenting in part). The statute penalizes parties who "fail to act reasonably and in good faith in settling lawsuits." *Eagleman v. Eagleman,* 673 So.2d 946, 947 (Fla. 4th DCA 1996); *accord Goode v. Udhwani,* 648 So.2d 247 248 (Fla. 4th DCA 1994). Early settlement of a case frees court time for the many other cases waiting to be heard.

Whether this lawsuit expended Florida's judicial resources is not a concern of Tennessee. The primary interest of section 768.79 is, in the words of the Restatement, how Florida's "judicial machinery functions." Restatement (Second) of Conflict of Laws § 122, cmt. a. In this case, a more realistic assessment of risk under the statute of limitations might have encouraged an early settlement instead of a lengthy jury trial and two appeals. Not to apply section 768.79 in this type of case would "impose an undue burden upon" Florida. Restatement (Second) of Conflict of Laws § 122, cmt. a. Lawsuits that arose elsewhere could willy-nilly consume

Florida's judicial resources, while purely Florida cases would be subject to the penalty provisions of section 768.79. Jurisdictions with court dockets less crowded than Florida's might not share the value that early settlement of a case is a "consummation Devoutly to be wished." W. Shakespeare, Hamlet, Act III, Scene I.

Application of section 768.79 to this case is consistent with the broad wording of subsection (1), which declares that it applies "in *any* civil action for damages *filed in the courts of this state.*" (Italics supplied). Significantly, the legislature did not limit the statute to cases "arising" or "accruing" in Florida, or to cases controlled by Florida substantive law. The plain meaning of the statute supports its use in this case.

Two other Restatement factors bolster the conclusion that section 768.79 should apply here. The offer of judgment statute is not "one to which the parties [were] likely to have given thought in the course of entering" into the accountant-client relationship. Restatement (Second) of Conflict of Laws § 122 cmt. a. Parties to a contract "do not usually place reliance on the applicability of the rules of a particular state to issues that would arise only if litigation should become necessary." *Id.* Also, the offer of judgment statute was not "likely to affect the ultimate result of the case." *Id.* Section 768.79 comes into play only after the determination of the "ultimate result."

Under the terminology of the Florida cases, the offer of judgment statute is a matter of procedural law for choice of law purposes. Section 768.79 is a part of Florida's "judicial machinery." Restatement (Second) of Conflict of Laws §122, cmt. a. It is a "procedural device for promoting judicial economy." *Paine Webber Jackson & Curtis, Inc. v. Winters,* 22

Conn.App.640, 579 A.2d 545, 553 (1990) (using Connecticut offer of judgment statute to penalize defendant for wasting Connecticut's judicial resources). British Car could have avoided the operation of the statute by bringing suit in Tennessee.

***373** This case is similar to *Weatherby Associates, Inc. v. Ballack,* 783 So.2d 1138 (Fla. 4th DCA 2001). An issue in *Weatherby* was whether a court could assess attorney's fees under section 57.105(1), Florida Statutes (1999), in a law suit arising out of an employment agreement that provided for Connecticut law to apply to any such litigation. Section 57.105(1) permits the award of attorney's fees where the action is frivolous, where there is a total lack of justiciable issues of either law or fact. *See, e.g., Muckenfuss v. Deltona Corp.,* 508 So.2d 340, 341 (Fla.1987).

Weatherby held that the award of fees under section 57.105(1) was proper, "because Weatherby filed and pursued a baseless lawsuit in a Florida court." *Weatherby,* 783 So.2d at 1143. Implicit in this ruling is the finding that section 57.105(1) fees were "procedural" for choice of law purposes, so that a Florida court could properly apply it in the interest of justice and efficient judicial administration. This court rejected Weatherby's argument that such fees should not be awarded because Connecticut's law governed the substantive issues in the case.

Both sections 57.105(1) and 768.79 impose sanctions for certain conduct occurring during litigation. Section 57.105(1) is akin to a court's inherent power to sanction litigants who act in bad faith or otherwise abuse the judicial process. *See Patsy v. Patsy,* 666 So.2d 1045, 1047 (Fla. 4th DCA 1996). Numerous

cases have described the offer of judgment statute as being "punitive." *See, e.g., Schussel v. Ladd Hairdressers, Inc.*, 736 So.2d 776, 778 (Fla. 4th DCA 1999) (describing section 768.79 as "punitive in nature"). As Seidman argues, the goals of the two statutes are the same--to ease the burden on Florida courts by preventing frivolous lawsuits, on the one hand, or preventing unreasonable assessments of their worth, on the other. *Weatherby* therefor supports the holding in this case.

British Car argues that *Clayton v. Bryan,* 753 So.2d 632 (Fla. 5th DCA 2000), and *Moran v. City of Lakeland,* 694 So.2d 886 (Fla. 2d DCA 1997) are controlling, but they are distinguishable. Both cases involve specific attorney's fee provisions in federal statutes that preempted section 768.79 under the supremacy clause of the United States Constitution. Such cases involve policies not present when considering a choice of law issue in a case where Florida has an offer of judgment statute and Tennessee does not.

Moran involved a suit under 42 U.S.C. §1983. The applicable federal statute authorizes fees to a prevailing defendant "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Moran*, 694 So.2d at 886-87 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 429 n.2, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). This limitation on a defendant's ability to recover fees implements Congress's intent to encourage citizens to seek redress for violation of their rights. To allow section 768.79 to override the federal statute would have a chilling effect on the bringing of civil-rights lawsuits, contrary to the intent of Congress.

Clayton concerned a suit brought under the Federal Fair Debt Collection Practices Act. That statute provides that fees are to

be awarded to a prevailing defendant only when the court expressly finds that the plaintiff's case was "brought in bad faith and for the purpose of harassment." *Clayton,* 753 So.2d at 633. By this section, Congress leveled the playing field between debtors and creditors. To apply section 768.79 to a case brought under the Act would create the obstacles to bringing suit which Congress expressly sought to avoid.

Recently, the eleventh circuit has held that section 768.79 is substantive under Florida choice of law principles. *See* ***374** *McMahan v. Toto,* 256 F.3d 1120, 1132 (11th Cir.2001). That ruling is not binding on this court. *See Pignato v. Great Western Bank,* 664 So.2d 1011, 1015 (Fla. 4th DCA 1995). [FN4] To reach its conclusion, the eleventh circuit relied primarily on the Article V cases, such as *Dvorak and Timmons,* an approach which is incorrect for the reasons set forth above. Also, the eleventh circuit wrote that the statute "is properly viewed as a type of 'loser pays' rule or standard." *McMahan,* 256 F.3d at 1134. This pigeonholding of section 768.79 gives inadequate emphasis to the statute's primary purpose of encouraging reasonable settlements. Under the statute, a plaintiff who obtains a judgment may still be responsible for fees if the amount of the judgment is twenty-five percent less than a defendant's offer of judgment.

> FN4. It appears that a Florida court's ruling on state law may be binding on federal courts, even where such a ruling specifically contradicts an earlier interpretation of the same law by the eleventh circuit. *See Roboserve, Ltd. v. Tom's Foods, Inc.,* 940 F.2d 1441, 1451 (11th Cir.1991); *Nussbaum v. Mortgage Serv. Am. Co.,* 913 F.Supp. 1548, 1554 (S.D.Fla. 1995).

POLEN, C.J., dissenting.

I believe the trial court correctly denied attorney's fees, and for that reason, I would affirm. To me, the resolution is much simpler than the majority and concurring opinions make it out to be.

While Judge Gross's well-reasoned concurring opinion spends much effort justifying section 768.79 as being procedural rather than substantive, and rejecting the Eleventh Circuit's contrary conclusion in *McMahan v. Toto,* 256 F.3d 1120, 1132 (11th Cir.2001), to me this statute is *both* procedural and substantive. But we are not here concerned with the procedural aspect. Whether or not the statute may be deemed "punitive" or a "sanction," the departure from common law principles [FN5] which allows a court to require one party to pay some of the attorney's fees of the other party (outside the section 57.105 context, with which I am inclined to agree with Judge Gross) makes this a substantive provision.

> FN5. *See Young v. Altenhaus,* 472 So.2d 1152 (Fla.1985).

I agree with that part of the majority's opinion which declares section 768.79 is not unconstitutional, as applied or otherwise. I further agree that Seidman is not estopped from changing its position that section 768.79 should now apply. But the absence of estopped does not mean we are obligated to accept Seidman's argument. In *Seidman* I, both parties stipulated that Tennessee law applied to this litigation. As the majority points out, both sides had made offers of judgment under the statute, yet neither side argued in the prior appeal that Tennessee law applied only to the merits. The reasoning of the trial judge here, that Tennessee law did not have a comparable offer of

judgment statute, so no attorney's fees could be awarded, should be affirmed. For these reasons, I respectfully dissent.

802 So.2d 366, 26 Fla. L. Weekly D2593

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FL ST s 768.79
West's F.S.A. § 768.79

WEST'S FLORIDA STATUTES ANNOTATED
TITLE XLV. TORTS
CHAPTER 768. NEGLIGENCE
PART 11, DAMAGES

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Current through End of 1999 1st Reg. Sess.

768.79. Offer of judgment and demand for judgment

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him or on the defendant's behalf pursuant to a policy of liability insurance or other contract from the date of filing of the offer if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award. Where such costs and attorney's fees total more that the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the plaintiff's award. If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees

incurred from the date of the filing of the demand. If rejected, neither an offer nor demand is admissible in subsequent litigation, except for pursuing the penalties of this section.

(2) The making of an offer of settlement which is not accepted does not preclude the making of a subsequent offer. An offer must:

(a) Be in writing and state that it is being made pursuant to this section.

(b) Name the party making it and the party to whom it is being made.

(c) State with particularity the amount offered to settle a claim for punitive damages, if any.

(d) State its total amount.

The offer shall be construed as including all damages which may be awarded in a final judgment.

(3) The offer shall be served upon the party to whom it is made, but it shall not be filed unless it is accepted or unless filing is necessary to enforce the provisions of this section.

(4) an offer shall be accepted by filing a written acceptance with the court within 30 days after service. Upon filing of both the offer and acceptance, the court has full jurisdiction to enforce the settlement agreement.

(5) an offer may be withdrawn in writing which is served before

the date a written acceptance is filed. Once withdrawn, an offer is void.

(6) Upon motion made by the offeror within 30 days after the entry of judgment or after voluntary or involuntary dismissal, the court shall determine the following:

(a) If a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served, and the court shall set off such costs in attorney's fees against the award. When such costs and attorney's fees total more than the amount of the judgment, the court shall enter judgment for the defendant against the plaintiff for the amount of the costs and fees, less the amount of the award to the plaintiff.

(b) If a plaintiff serves an offer which is not accepted by the defendant, and if the judgment obtained by the plaintiff is at least 25 percent more than the amount of the offer, the plaintiff shall be awarded reasonable costs, including investigative expenses, and attorney's fees, calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served.

For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was

reduced. For purposes of the determination required by paragraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced.

(7)(a) If a party is entitled to costs and fees pursuant to the provisions of this section, the court may, in its discretion, determine that an offer was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees.

(b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:

1. The then apparent merit or lack of merit in the claim.

2. The number and nature of offers made by the parties.

3. The closeness of questions of fact and law at issue.

4. Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer.

5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties.

6. The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.

(8) Evidence of an offer is admissible only in proceedings to enforce an accepted offer or to determine the imposition of sanctions under this section.

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No. 02-1292

In the

Supreme Court of the United States

NEMESIS VERITAS, L. P., FKA MCMAHAN & COMPANY and D. BRUCE MCMAHAN,

Petitioners,

v.

WILLIAM A. TOTO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF THE ISSUE

Respondent submits that the following more accurately and succinctly reflects the question presented by Petitioners:

Is a federal court, which is sitting in diversity jurisdiction and pledged by federal law to follow the substantive law of the forum state, required by federal law to follow a choice of law analysis when to do so would be contrary to the substantive law of the forum state?

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REASONS FOR DENYING THE WRIT

1.

In this diversity action, the Eleventh Circuit correctly followed the law of the forum state and decided, as a result, that Florida's Offer of Judgment Statute applied, despite the fact that Virginia law governed the cause of action.

(a) The Decision in *BDO Seidman*:

On October 31, 2001, the Fourth District Court of Appeal became the first Florida appellate court to decide the issue of whether Florida's Offer of Judgment Statute, Fla. Stat. § 768.79, applied in Florida cases where the law of another state governed the cause of action. *BDO Seidman v. British Car Auctions*, 802 So.2d 366, 369 (Fla. 4th DCA 2001). Judge Klein, writing for the majority, held that the correct analysis did not, strictly, involve the state's choice of law rules, and that the statute would apply in all cases otherwise governed by foreign law. *BDO Seidman*, 802 So.2d at 369. Judge Gross concurred, but wrote separately to point out that even under a choice of law analysis the statute would apply: "because the offer of judgment statute is 'procedural' under Florida choice of law terminology: it is part of the machinery of Florida's judicial process that promotes judicial economy." *Id.* at 370.

(b) The Effect of Majority Appellate Decisions in Florida:

The concurrence of two out of a panel of three judges constitutes the decision of a Florida District

Court of Appeal. Fla. R. Jud. Admin. 2.040 (a) (1).[1] The opinion of a dissenter has no precedential effect. See, e.g., *Bauer v. State*, 528 So.2d 6, 11 (Fla. 2d DCA 1988). The concurrence of Judges Klein and Gross in *BDO Seidman*, therefore, constituted the decision of the court.

(c) *Stare Decisis* in Florida:

Florida's District Courts of Appeal are not intermediate courts and their decisions are, in most cases, final and absolute. See, e.g., *Ansin v. Thurston*, 101 So.2d 808, 810 (Fla. 1958); *Johns v. Wainwright*, 253 So.2d 873, 874 (Fla. 1971). As the Florida Supreme Court has stated:

> ". . . the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court." *Stanfill v. State*, 384 So.2d 141, 143 (Fla. 1980). Thus, in the absence of inter-district conflict, district court decisions bind all Florida trial courts. *Weiman v. McHaffie*, 470 So.2d 682, 684 (Fla. 1985).

Pardo v. State, 596 So.2d 665, 667 (Fla. 1992).

(d) *BDO Seidman* as governing Florida law:

The Florida Supreme Court declined to review the Fourth District's decision on September 24, 2002. *British Car Auctions, Inc., v. BDO Seidman, L.L.P.*, 828 So.2d 384 (Fla. 2002). The Fourth District's decision

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[1] "Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision." Fla. R. Jud. Admin. 2.040 (a) (1).

in *BDO Seidman* is therefore final and represented the current law in Florida as to the application of Fla. Stat. § 768.79 in cases otherwise governed by foreign law at the time of the Eleventh Circuit's decision. Indeed, Florida's Fifth District Court of Appeal has now expressly approved and followed the Fourth District's decision in *BDO Seidman*. See *Bennett v. Morales*, 2003 Fla. App. LEXIS 3790 * 4 (Fla. 5th DCA 2003)(stating that ". . . section 768.79 applies to all civil actions for damages brought in Florida, even where the substantive law of another jurisdiction is applied"). See also, *Pastor v. Union Cent. Life. Ins. Co.*, 184 F.Supp. 2d 1301, 1307 (S.D. Fla. 2002)(following the logic of *BDO Seidman* in determining the application of Fla. Stat. § 624.155 in a diversity action).

(e) The Eleventh Circuit's Application of *BDO Seidman*:

The issue before the Eleventh Circuit was whether the United States District Court for the Southern District of Florida should have applied Florida's Offer of Judgment Statute, Fla. Stat. § 768.79, in a case where Florida's choice-of-law rules mandated that the substantive law of another state governed the underlying claim. *BDO Seidman* stated that in such circumstances the statute should be applied. There was no contrary Florida Supreme Court decision. There was no contrary Florida District Court of Appeals decision. *BDO Seidman* was therefore governing. See, *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, 775 (11th Cir. 2000); *Pardo v. State*, 596 So.2d 665, 667 (Fla. 1992). In diversity cases, the courts of the United States are to apply the substantive laws of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). That is what the Eleventh Circuit did.

2.

There is no conflict between the decision of the Eleventh Circuit in this case and that of the Tenth Circuit in *Boyd Rosene and Associates v. Kansas Municipal Gas Agency*, 123 F.3d 1351 (10th Cir. 1997).

In diversity cases, the courts of the United States are to apply the substantive laws of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The choice-of-law rules of the forum state are a part of that substantive law and may not be ignored. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). This, though, is not to say that a federal court *must* follow a choice-of-law analysis when the state court would not do so. The federal objective is to ensure that two courthouses on the same block, one State and one federal, follow the same rules and reach the same result on any given set of facts. See, *e.g. Day & Zimmermann, Inc. v. Challoner et al.*, 423 U.S. 3, 5 (1975). That uniformity is necessary. These precepts, though, recognize that federal courts in different states, applying the laws of those different States, will follow different analyses and reach different results on similar legal questions. That lack of uniformity is natural and expected.

In reaching its decision in *Boyd Rosene and Associates v. Kansas Municipal Gas Agency*, 123 F.3d 1351 (10th Cir. 1997), the Tenth Circuit followed the analysis mandated by the forum state of Oklahoma. In the present case, the Eleventh Circuit followed the analysis mandated by the forum state of Florida. Any difference in result is merely the consequence of the fact that federal courts considering two, different, attorneys'

fees statutes, in two different, diversity cases, were bound to follow the two, different analyses mandated by the laws of the two, different, forum states. There is no "split" between the two Circuits as to the precepts of the *federal* law controlling the analysis.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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No. 02-1292

Supreme Court of the United States
October Term, 2002

NEMESIS VERITAS, L.P. f/k/a MCMAHAN & COMPANY
and D. BRUCE MCMAHAN,

Petitioners,

-against-

WILLIAM A. TOTO,

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RESPONDENT'S BRIEF DEMONSTRATES WHY THE WRIT SHOULD BE GRANTED

A. The Eleventh Circuit's Improper Determination Undermines A 60 Year Old Rule Concerning The Choice-Of-Law Analysis Required In Diversity Actions

Respondent admits that Fla. Stat. §768.79 is a state substantive law and that the issue facing the Eleventh Circuit in this diversity action was whether the substantive law of Virginia or Florida applied (Resp. Brief p. 4). It also is undisputed that, to determine which state's law to apply, the Eleventh Circuit was required to apply the forum state's choice of law rules. *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 96 S. Ct. 167, 46 L.Ed2 3 (1975). *See* Resp. Brief p. 4. Respondent does not and cannot deny that Virginia law, and not Florida's §768.79, would apply in this case had the Eleventh Circuit applied Florida's choice of law rules in ascertaining which law to apply.

Respondent is wrong in asserting (Ibid.) that a federal court is not required to follow a choice-of-law analysis when the state court failed to do so. The case cited for this proposition, *Day & Zimmerman, supra,* states exactly the opposite (423 U.S. at 4-5, 96 Ct. at 168): "[T]he conflict-of-laws rules to be applied by a federal court in Texas must conform to those prevailing in the Texas state courts.***The Court of Appeals in this case should identify and follow the Texas conflicts rule. What substantive law will govern when Texas' rule is applied is a matter to be determined by the Court of Appeals." Thus, the holding in *BDO Seidman v. British Car Auctions,* 802 So.2d 366, 368 (Fla. 4th DCA 2001), that Fla. Stat. §768.79 "should be applied without engaging in a conflict

of laws analysis" because, according to the statute, it "applies to 'any civil action for damages filed in the courts of this state'" is irrelevant in a federal diversity action since the issue in the first instance is whether §768.79 applies at all.

Finally, it cannot be asserted that *BDO Seidman* interpreted Florida's choice-of-law rules. BDO specifically refused to engage in any choice-of-law analysis.

Therefore, there is an urgent need for this Court to correct the Eleventh Circuit's misapprehension of the law so as to prevent the undermining of a 60 year old rule concerning the choice-of-law analysis required in diversity cases.

B. The Eleventh Circuit's Determination Conflicts With A Determination Made By The Tenth Circuit

The Petition noted that the Eleventh Circuit's failure to employ a choice-of-law analysis in considering whether to apply a state attorney fee statute in a diversity case conflicts with a determination of the Tenth Circuit and that this is a substantial reason for granting certiorari. In *Boyd Rosene and Associates v. Kansas Municipal Gas Agency,* 123 F.3d 1351 (10th Cir. 1997)(En banc), the Tenth Circuit directed the lower court to first apply the forum state's choice-of-law rules in determining which state's law to apply in respect of the award of attorney's fees.

Respondent is wrong in contending that (Resp. Brief p. 4) "the Tenth Circuit followed the analysis mandated by the forum state of Oklahoma" and that, therefore, no conflict exists. In *Boyd,* the Tenth Circuit cited only federal case law in requiring a choice-of-law analysis (123 F.3d at 1352-3):

> First, in this circuit, the matter of attorney's fees in a diversity suit is substantive and is controlled by state law. See Public Serv. Co. of Colorado v. Continental Cas. Co., 26 F.3d 1508, 1520 (10th Cir. 1994); Missouri Pacific RR. Co. v. Kansas Gas and Elec. Co., 862 F.2d 796, 801 (10th Cir. 1988). Second, a federal court sitting in diversity must apply the substantive law of the state in which it sits, including the forum state's choice-of-law rules. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 495-97, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941); Barrett v. Tallon, 30 F.3d 1296, 1300 (10th Cir. 1994). ***[R]ather than automatically applying the law of the state providing the substantive contract law, a district court must first apply the forum state's choice-of-law rules in resolving attorney's fees issues.[1]

Importantly, respondent does not dispute the fact that the forum state attorney fee statutes of Florida and Oklahoma both require the assessment of attorney's fees "In any civil

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[1] The Tenth Circuit subsequently affirmed the lower court's determination on remand that Oklahoma's attorney fee statute was a substantive, not procedural, law for choice-of-law purposes and that under Oklahoma choice-of-law principles, Kansas law which governed the parties' agreement controlled. *Boyd Rosene and Associates v. Kansas Municipal Gas Agency,* 174 F.3d 1115 (10th Cir. 1999). The Tenth Circuit's analysis is similar to the Eleventh Circuit's original decision in *McMahan v. Toto,* 256 F.3d 1120 (11th Cir. 2001), *amended* 311 F.3d 1077 (11th Cir. 2002).

action". However, the Tenth Circuit determined that the statutory wording did not permit the ignoring of federal law mandating a choice-of-law analysis as *McMahan* implicitly held by relying on *BDO Seidman.* Accordingly, there is a conflict between the Tenth and Eleventh Circuits.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated May 14, 2003

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